85-1414

No.....

Supreme Court, U.S.
FILED
FEB 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

LAPEYROUSE GRAIN CORPORATION and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Petitioners,

vs.

FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Having provided a right of appeal, whether the State of Alabama denied petitioners due process of law and equal protection of the law to which they were entitled pursuant to the Fourteenth Amendment by denying petitioners access to such right of appeal by reason of the action of the Alabama Supreme Court in requiring petitioners to take an appeal or forsake their right of appeal during a period when there was no appealable judgment adverse to petitioners and petitioners had no knowledge or reasonably could be expected to have knowledge that they were aggrieved by any state action.

2. Whether Petitioners were deprived of property without due process of law and denied equal protection of the law in violation of the Fourteenth Amendment when the Alabama Supreme Court newly interpreted an Alabama procedural rule so as to deprive petitioners of all of their rights to appeal to which they and all other persons are entitled under Alabama appellate law and practice.*

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*The names of all parties to the proceedings are contained in the caption of the case. Lapeyrouse Grain Corporation is 85% owned by Cargill, Inc. and 15% by J. Henry Schroder Bank & Trust Company. Lapeyrouse Grain Corporation of Alabama is wholly owned by Lapeyrouse Grain Corporation. Lapeyrouse Grain Corporation has other wholly owned subsidiaries which are not enumerated herein.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively referred to as "Lapeyrouse") petition for a writ of certiorari to review the judgments and orders of the Supreme Court of Alabama referenced herein.

OPINIONS BELOW

The original opinion of the Supreme Court of Alabama, Case No. 84-424, dated September 27, 1985, is un-

officially reported at 19 Ala. Bar Rptr. 3804 and is reproduced in the Appendix, *infra* at A-1. The original opinion was later withdrawn and the new opinion of the Supreme Court of Alabama, Case No. 84-424, dated October 11, 1985, is officially reported at 479 So.2d 1226 and is reproduced in the Appendix, *infra* at A-8. The opinion of the Supreme Court of Alabama, Case No. 84-424, denying Lapeyrouse's application for rehearing and dated November 22, 1985, is officially reported at 479 So.2d 1226 and is reproduced in the Appendix, *infra* at A-12.

The order of the Supreme Court of Alabama, Case No. 85-393, dismissing Lapeyrouse's appeal and dated January 28, 1986, has not been reported but is reproduced in the Appendix, *infra* at A-19.

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STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Alabama, Case No. 84-424, granting the petition for writ of mandamus against Lapeyrouse and dismissing Lapeyrouse's cross-appeal was entered on October 11, 1985. (A-8) An application for rehearing was timely filed by Lapeyrouse on October 25, 1985. (A-69) The application for rehearing was overruled on November 22, 1985. (A-12) This petition for a writ of certiorari is being filed within ninety (90) days of the denial of Lapeyrouse's application for rehearing on November 22, 1985.

Additionally, this petition is being filed within ninety (90) days of the entry of judgment by the Supreme Court

of Alabama, Case No. 85-393, on January 28, 1986, dismissing Lapeyrouse's appeal. (A-19)

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

> [N]or shall any state deprive any person of . . . property, without due process of law; . . . .

2. The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides as follows:

> [N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

3. Rule 59.1 of the Alabama Rules of Civil Procedure provides as follows:

> Rule 59.1
>
> DISPOSITION OF NEW TRIAL AND OTHER POST-TRIAL MOTIONS
>
> No post-trial motion filed pursuant to Rules 50, 52 or 59 shall remain pending in the trial court for more than 90 days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to dispose of any pending post-trial

motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.

STATEMENT OF THE CASE

A. Facts Material to the Questions Presented

On Janaury 26, 1983, Flora J. Nelson, d/b/a W. J. Nelson Company, (hereinafter referred to as "Nelson") commenced this action by filing a complaint against Lapeyrouse in the Circuit Court of Baldwin County, Alabama, Civil Action No. CV-83-500016, seeking an equitable accounting and damages on theories of conversion and breach of fiduciary duty. (A-29) Lapeyrouse in turn filed a counterclaim against Nelson for money loaned and advanced by Lapeyrouse to Nelson. Judge Claud D. Neilson was appointed by the Supreme Court of Alabama to hear the case as an outside judge due to the recusal of the two Baldwin County Circuit Judges.

On July 30, 1984, Judge Neilson entered judgment for $561,537.47 against Lapeyrouse based upon the jury verdicts rendered in favor of Nelson on Nelson's claim against Lapeyrouse and Lapeyrouse's counterclaim against Nelson. (A-23) Lapeyrouse filed post-trial motions pursuant to Rules 50 and 59 of the Alabama Rules of Civil Procedure, including motions for judgment notwithstanding the verdict and for a new trial, on August 8, 1984. (A-37) Under Rule 59.1 of the Alabama Rules of Civil Procedure, a motion for new trial must not remain pending for more than ninety days or else it is denied by

operation of law at the expiration of the ninetieth day. Ala. R. Civ. P. 59.1. Ninety days from August 8, 1984 was November 6, 1984.

On November 5, 1984, and within the ninety-day deadline under Rule 59.1, the trial court set aside the jury verdicts and granted Lapeyrouse's motion for new trial. A written order to this effect was signed by Judge Neilson on November 5, 1984 ("the Order"). (A-25) The Order was issued from Judge Neilson's office in Linden, Alabama, which is approximately 130 to 150 miles from Bay Minette, Alabama. The Order was mailed by Judge Neilson's secretary on November 5, 1984 to Clerk of the Circuit Court of Baldwin County in Bay Minette, Alabama, and copies of the Order were that same day mailed to counsel for both Nelson and Lapeyrouse. (Affidavits of Judge Claud D. Neilson and Ruth Raines [A-56-57, 60].) The Order was received by counsel of record for Lapeyrouse (whose office is in Mobile, Alabama) in the morning mail on November 6, 1984. (Affidavit of Kathryn E. Errington [A-62].) This was prior to the expiration of the ninety-day period under Rule 59.1. On November 8, 1984, the Order was entered on the docket sheet by the clerk's office. (Affidavit of Barbara M. Judge [A-66].) However, the docket sheet itself reflects the date of November 5, 1984, as the date that the Order was entered thereon. (A-51) The date of November 5, 1984, is within the ninety-day period; the date of November 8, 1984, is outside it.

There is no indication that copies of the November 5, 1984 Order stamped "filed" were ever mailed by the clerk to counsel for the parties. (A-51) In fact, counsel for Lapeyrouse only received a copy of the unstamped order

from the trial judge's office. (Affidavit of Kathryn E. Errington [A-62].)

Under Alabama appellate procedure, a party has 42 days within which to appeal from the entry of an adverse judgment or order. However, the running of the appeal time is suspended while certain post-trial motions, such as a motion for new trial, are pending. Ala. R. App. P. 4(a) (3). (A-106-107) On December 13, 1984 (thirty-eight (38) days from the trial court's Order setting aside the judgment and granting new trial), Nelson filed a notice of appeal to the Supreme Court of Alabama. (A-52-53) Nelson appealed in part from the Order granting a new trial and in part from other orders and rulings of the trial court. There was no contention by Nelson, Lapeyrouse or anyone else at this time that the Order granting a new trial might later be held to be void or not effective. Indeed, Nelson acted on the basis that it was a valid, appealable order and appealed from it.

Nelson also appealed from more than the Order setting aside the judgment against Lapeyrouse and granting a new trial. In this regard, she appealed from the trial court's pretrial order and from all other orders and rulings at trial which were adverse to her. In its pretrial order, the trial court had held that Nelson could not pursue certain theories of damages which prohibited Nelson from seeking the full scope of relief demanded in her complaint. (A-20-22) Further, during the course of trial there were many evidentiary rulings, objected to by Nelson, which diminished her claims for damages and from which she appealed in the above-referenced notice. Thus, Nelson's appeal clearly extended beyond the one Order of November 5, 1984.

Alabama appellate procedure provides that "if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days (2 weeks) of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires." Ala. R. App. P. 4(a) (2). (A-106) Therefore, a notice of cross-appeal may be filed within 14 days of the filing of the original notice of appeal, even though the cross-appeal notice falls outside the original 42-day appeal period.

On December 26, 1984 (thirteen (13) days from the filing of Nelson's appeal), Lapeyrouse filed a notice of cross-appeal to the Supreme Court of Alabama from the denial of Lapeyrouse's motion for judgment notwithstanding the verdict. (A-54) This notice was filed because the trial court did not refer to or rule upon Lapeyrouse's j.n.o.v. motion in the November 5, 1984 Order, and, therefore, by virtue of Rule 59.1 this particular motion (but only this one) was denied by operation of law. Inasmuch as the judgment against Lapeyrouse had been set aside, Lapeyrouse, of course, did not appeal from that judgment.

On January 28, 1985, Nelson filed a petition for writ of mandamus with the Supreme Court of Alabama seeking an order requiring the trial court to vacate the Order setting aside the judgment against Lapeyrouse and granting a new trial. On that same day, Nelson filed a separate motion to dismiss Lapeyrouse's cross-appeal as untimely. On February 21, 1985, the Supreme Court of Alabama entered an order staying all proceedings relating to Nelson's appeal, Lapeyrouse's cross-appeal and Nelson's motion to

dismiss Lapeyrouse's cross-appeal pending resolution of the petition for writ of mandamus.

In support of her mandamus petition, Nelson espoused the theory that Rule 59.1 requires not only that the trial judge must enter a written order granting the motion for new trial within the ninety-day period, but also that the clerk of court must ministerially stamp the written order "filed" within the ninety-day period before it becomes effective. Otherwise, Nelson argued, the motion would be denied by operation of law.

On September 27, 1985, the Supreme Court of Alabama rendered an opinion denying Nelson's petition for writ of mandamus. (A-1) On September 30, 1985, the Court ordered *ex mero motu* and without explanation that the cause be placed on rehearing. On October 11, 1985, *almost a year after all appeal periods for either party had run,* the Supreme Court of Alabama withdrew its earlier opinion and rendered an opinion granting Nelson's petition for writ of mandamus. (A-8) The Court also stated in the opinion that Lapeyrouse's cross-appeal would be dismissed as untimely because it was not filed within the 42-day period for original appeals. (A-9-10) On October 25. 1985, Lapeyrouse filed an application for rehearing with respect to the opinion of October 11, 1985. (A-69) On November 22, 1985, the Supreme Court of Alabama overruled Lapeyrouse's application without addressing any of the issues and arguments raised by Lapeyrouse, including the federal constitutional questions concerning the arbitrary deprivation of all of Lapeyrouse's rights to appeal. (A-12)

On December 12, 1985, the trial court entered an order in accordance with the mandate of the Supreme Court of

Alabama setting aside the Order of November 5, 1984. (A-28) Lapeyrouse timely filed a new notice of appeal to the Supreme Court of Alabama, Case No. 85-393, from the trial court's order setting aside the previous November 5, 1984 Order. (A-91)

In its notice of appeal, Lapeyrouse stated that the new appeal was timely inasmuch as the filing of the trial court's order of December 12, 1985, which was rendered and entered pursuant to the mandate of the Supreme Court of Alabama, constituted the first time a final, appealable judgment had been entered in the case reinstating the judgment against Lapeyrouse. (A-92) *Prior to that time, no adverse judgment from which Lapeyrouse could take an appeal even existed.* Nevertheless, on January 28, 1986, the Supreme Court of Alabama dismissed Lapeyrouse's appeal in Case No. 85-393 without opinion and without asserting any justification for foreclosing from Lapeyrouse every opportunity to appeal the adverse judgment. (A-19)

Lapeyrouse has filed an application for rehearing in the Supreme Court of Alabama, Case No. 85-393, regarding the dismissal of the new appeal. (A-96) The application has not been ruled upon at the time of the printing of this petition. Since the deadline for filing this petition for writ of certiorari with respect to the Supreme Court of Alabama's judgment in Case No. 84-424 was rapidly approaching, Lapeyrouse deemed it appropriate to include the related judgment in Case No. 85-393, which may or may not be modified on rehearing, as part of the basis for this petition.

B. Manner of Raising Federal Questions

In its Application for Rehearing and Brief in Support Thereof in Case No. 84-424, Lapeyrouse contended that the Supreme Court of Alabama's judgment of October 11, 1985, which granted Nelson's petition for writ of mandamus and dismissed Lapeyrouse's cross-appeal, "violate[d] Lapeyrouse's right to substantive and procedural due process and to equal protection of the laws under the Constitution of the United States." (A-75) The federal constitutional issues were also briefed on pages 22-26 and 34-45 of the application. (A-75-78, 78-87) In its opinion dated November 22, 1985, overruling Lapeyrouse's application for rehearing, the Supreme Court of Alabama did not comment on the constitutional questions. (A-12)

Inasmuch as Lapeyrouse contends that it was the October 11, 1985 judgment itself which violated Lapeyrouse's federal constitutional rights, Lapeyrouse raised the constitutional questions at the first opportunity in its application for rehearing. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 678 (1930). Before the October 11, 1985 opinion was rendered, there existed no judgment which violated Lapeyrouse's constitutional rights and, thus, there was no prior opportunity for Lapeyrouse to raise the constitutional questions embodied herein.

Lapeyrouse also contended in its application for rehearing regarding the dismissal of the new appeal (Case No. 85-393) that the Supreme Court of Alabama's judgment of January 28, 1986, violated Lapeyrouse's rights to due process and equal protection under the Fourteenth Amendment. (A-96-101) This, too, was the first time that the constitutional questions could have been raised in that particular proceeding.

REASONS FOR GRANTING THE PETITION

A. Lapeyrouse Was Deprived of Any and Every Opportunity to Appeal from the Adverse Judgment Against It.

Lapeyrouse has suffered a shocking deprivation of property while being denied due process and equal protection of the law by the Supreme Court of Alabama. The Alabama court effectively reinstated a judgment of $561,537.47 plus interest, which had previously been set aside, against Lapeyrouse while at the same time denying Lapeyrouse its fundamental right to appeal from the judgment. If the judgment is permitted to stand, deprivation of Lapeyrouse's property is accomplished without its ever having had an opportunity to defend against the exaction. *See Brinkerhoff*, 281 U.S. at 679.

The constitutional guaranty of "due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff*, 281 U.S. at 680. Within the judicial branch, "a fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful way." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citations omitted). "Prior cases establish, first, that due process requires, at minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claim of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

The federal constitutional right to be heard in defense of one's property extends equally to the appellate

process where a right to appeal exists under state law. That is, once a state has established avenues of appellate review, those avenues "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1955). When an appeal is afforded, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause" of the Fourteenth Amendment. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).[1]

In particular, this Court has held that the right to be heard under the Due Process Clause is violated by a state supreme court when it announces an unanticipated interpretation of law and applies it to the case at bar, and in so doing effectively denies a party the opportunity to appeal from the application of the new interpretation in that case. In *Brinkerhoff*, 281 U.S. 673, a trustee, on behalf of Brinkerhoff's shareholders, sought to enjoin collection of a tax allegedly assessed in a discriminatory manner and to have the valuation lowered. A prior state supreme court decision, *Laclede Land & Improvement Co. v. State Tax Comm'n*, 295 Mo. 298, had held that the state tax commission had no power to provide the remedy sought by the Brinkerhoff trustee. Accordingly, the trustee sought

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[1]Lapeyrouse was entitled to a statutory right of appeal pursuant to *Code of Ala.* (1975), § 12-22-2, which provides as follows:

> From any final judgment of the circuit court or probate court, an appeal lies to the appropriate appellate court as a matter of right by either party, or their personal representatives, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure.

relief from the courts. On appeal, the state supreme court first reversed its earlier decision and held that the tax commission did have the power to provide the remedy sought. It then refused equitable relief, on the ground that a legal remedy was available from the tax commission, and finally held that, because the trustee had not complained to the tax commission at the outset, he was "clearly guilty of laches." 281 U.S. at 676. Hearing the case on certiorari, this Court held: "[I]n applying the new construction [of the tax commission's enabling legislation] to the case at bar, and in refusing relief because of the newly found powers of the commission, the [state supreme] Court transgressed the due process clause of the Fourteenth Amendment . . . . [T]he judgment of the Supreme Court of Missouri must be reversed, because it has denied [the trustee] due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* at 677-78.

Brinkerhoff supports the proposition that the Due Process Clause prohibits a state high court from applying a new interpretation of state law to the litigants before it where to do so would prevent, because of untimeliness, resort to the remedy made available for the first time by the new ruling and where an adequate remedy is not otherwise available. The unfairness of this type of decision is its "catch-22" nature: the decision bars a party from a procedural remedy otherwise available solely because it did not timely pursue that procedural course, when that course itself was made possible by the high court in that very decision only after the time for taking it had expired. Speaking for the Court in *Brinkerhoff*, Justice Brandeis explained the offending nature of the

state supreme court's decision by noting that the "possibility of relief from the Tax Commission was not suggested by anyone . . . until it was too late for the [trustee] to avail itself of the newly formed remedy." 281 U.S. at 677.

The well-reasoned concept of fairness as announced in *Brinkerhoff* is not unlike the prohibition against the retroactive application of state criminal law as implemented by unforeseeable judicial construction. *See Marks v. United States,* 430 U.S. 188 (1977). In *Bouie v. City of Columbia,* 378 U.S. 347 (1964), a case involving the Fourteenth Amendment, this Court reversed certain trespass convictions, finding that they rested upon an unexpected construction of a state's trespass statute by its supreme court:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Id. at 343-354. Similarly, in *Rabe v. Washington,* 405 U.S. 313 (1972), *reh'g denied* 406 U.S. 911 (1972), this Court "reversed a conviction under a state obscenity law because it rested on an unforeseeable judicial construction of the statute. [This Court] stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied." *Marks,* 430 U.S. at 192. This principle is equally applicable to the civil appellate proceedings at hand.

The symptoms of unconstitutional deprivation of property are manifest in the facts of Lapeyrouse's case: Within the ninety-day time frame permitted under Alabama's procedural rule, the trial judge rendered, and entered, a written order setting aside a judgment against Lapeyrouse. There was no requirement under the then current interpretation of the rule that the clerk ministerially "enter" the judgment within the time limitation. The trial judge sent copies of the order to counsel for both parties. Lapeyrouse's counsel received the written order within the ninety-day time period, and it is a reasonable inference that the clerk's office received the written order at the same time. However, upon receipt the clerk did not promptly stamp the order "filed," nor did the clerk then enter the order on the docket sheet. Instead, the clerk waited until the ninety-second (92nd) day to stamp the order "filed" and to enter it on the docket sheet. However, when the order was entered on the docket sheet, the date of entry was recorded as the eighty-ninth (89th) day, not the ninety-second (92nd) day. Copies of the order bearing the ninety-second (92nd) day filing stamp were not delivered to counsel for the parties.

Each party acted on the basis that the order setting aside the judgment was effective on the eighty-ninth (89th) day, which was within the time limitation under the rule. The plaintiff, Nelson, appealed the order to the Supreme Court of Alabama. While in the process of preparing her appellate brief, Nelson ordered and received copies of the clerk's file, which included a copy of the order in question stamped "filed" on the ninety-second (92nd) day. Nelson then filed a petition for writ of mandamus in the Supreme Court of Alabama based upon the theory that the

trial court's order was not effective because it was not stamped filed by the clerk until the ninety-second (92nd) day.

After all periods for appeal by either side had run, the Alabama Supreme Court surprisingly construed Rule 59.1 to require that the clerk must take ministerial action on the written judgment within the ninety-day period for the trial court's order to become effective. The high court issued a writ of mandamus requiring the trial court to set aside its previous order and to reinstate the judgment against Lapeyrouse. The court further opined that Lapeyrouse would have no right to appeal the adverse judgment to be reinstated by the trial court. Upon the reinstatement of the judgment by the trial court, Lapeyrouse nevertheless attempted an appeal which was immediately dismissed by the Alabama high court as untimely.

By changing the requirements of Rule 59.1 almost one year after Lapeyrouse had any opportunity to be heard under the retroactively applied new interpretation, the Supreme Court of Alabama effectively deprived Lapeyrouse of any and every right to appeal the judgment against it. Prior to the October 11, 1985 decision, Lapeyrouse had no opportunity or reason to cast an appeal inasmuch as the judgment against it had been set aside and was no longer in existence. It was not until the reactivation of that judgment in late 1985, through the mandate of the Supreme Court of Alabama, that Lapeyrouse had any reason or opportunity to appeal. However, at that time the Alabama court implemented its "catch-22" ruling by holding that Lapeyrouse's appeal time had long expired and that it was not entitled to defend its position. That action, quite simply, violated the due process prin-

ciples announced in *Brinkerhoff* and the other decisions referenced above.

Prior to the Supreme Court of Alabama's opinion of October 11, 1985 (A-8), there was no doubt that Ala. R. Civ. P. 59.1 required only that the trial judge render his order within the ninety-day period. Rule 59.1 itself says that "no post-judgment motion shall *remain pending* in the trial court for more than 90 days." The term "pending" describes the status of a motion before it is *ruled upon* by the court. It does not describe the status of a motion after it has been ruled upon by the court but before the clerk has performed the ministerial act of entering the order or judgment. Rule 59(g) of the Alabama Rules of Civil Procedure expressly provides that post-trial motions "remain pending until *ruled upon* by the court," subject to the time limitation under Rule 59.1 (A-105) Rule 59(g) does not say that a post-trial motion remains pending until the clerk has performed the ministerial act of "entering" the judgment or order.

In *State v. Wall,* 348 So.2d 482, 483 (Ala. 1977), the Supreme Court of Alabama held that "[a] post-trial motion, like any other motion, is pending as of its filing and until *acted upon* by the court." The court did not hold, and had never held prior to the October 11, 1985 opinion, that a post-trial motion remained pending even after it had been ruled upon or acted upon by the judge but before the clerk had stamped the written order as "filed."

Rule 59.1 further provides that "[a] failure by the trial court to dispose of any pending post-judgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the

date of the expiration of the period." All of the previous Alabama cases addressing Rule 59.1 are in accord that "dispose of" meant "ruled upon" by the trial court. The Rule clearly did not require the ministerial act of entry of judgment by the clerk. *See French v. Steel, Inc.*, 445 So.2d 561 (Ala. 1984) ("rule on"); *Patton v. Cleveland Consolidated, Inc.*, 435 So.2d 1283 (Ala. App. 1982), *rev'd on other grounds* 435 So.2d 1285 (Ala. 1983) ("rule on"); *Crowder v. Zoning Board of Adjustment*, 406 So.2d 917 (Ala. App. 1981), *cert. denied* 406 So.2d 919 (Ala. 1981) ("rule on"); and *State Farm Mut. Auto. Ins. Co. v. Wagnon*, 53 Ala. App. 712, 304 So.2d 216 (1974) ("rule on"). Under no stretch of the imagination can these cases be construed to require that the clerk stamp or otherwise "enter" the written order or judgment within the ninety-day period under Rule 59.1. These cases, however, were not distinguished or even addressed by the Supreme Court of Alabama in its opinion of October 11, 1985, which materially altered the requirements under Rule 59.1.

Further, under prior practice Rule 59.1 imposed upon the trial judge, not the clerk, the duty to dispose of any "pending" post-judgment motion within the ninety-day time limitation. The judge, of course, could "dispose of" a pending motion by ruling upon it. The motion would then no longer be pending. The clerk, however, could not dispose of a pending motion. The clerk could only act on a non-pending motion—*i.e.*, one the judge had already ruled upon and made non-pending. However, under the new interpretation of Rule 59.1 as applied to Lapeyrouse, the clerk (or register, as the case may be) is required to "dispose of" pending post-trial motions by ministerially entering the written judgment within the time deadline.

This was clearly not the law prior to the October 11, 1985 opinion.

Each Alabama procedural rule which requires the "entry" of judgment (as defined under Rule 58(c) [A-104]) to trigger some time limitation expressly refers to "entry of judgment." For example, Rule 50(b) says that a motion for j.n.o.v. shall be filed "not later than 30 days after *entry of judgment.*" Rule 59(b) says that "a motion for new trial shall be filed not later than 30 days after the *entry of judgment.*" Rule 59(e) says that a motion to alter, amend or vacate a judgment shall be filed "not later than 30 days after the *entry of judgment.*" Rule 4(a)(1) of the Alabama Rules of Appellate Procedure says that an appeal shall be filed within 42 days "of the date of *entry of judgment or order* appealed from." Subsection (3) of the same rule provides that "where post-judgment motions are filed, the full time fixed for filing a notice of appeal shall be computed from the *date of the entry in the civil docket* of an order granting or denying such motion." (A-106-107) Rule 59.1, on the other hand, says nothing about the entry of a judgment or order. Prior to the October 11, 1985 opinion, the only reasonable assumption which could have been made about the absence of the terms "entry of judgment" from Rule 59.1 was that the Rule did not require the ministerial entry of judgment by the clerk within the ninety-day period.

Even assuming, *arguendo*, that entry of judgment was required under Rule 59.1, the written order of the trial judge was itself a sufficient "entry" of judgment under Rule 58(c). (A-104) This interpretation of what constitutes "entry of judgment" under Ala. R. Civ. P. 58(c) is confirmed by the Supreme Court of Alabama Advisory

Committee on Civil Practice and Procedure (drafters of the Rule) in their meeting minutes dated November 17, 1972. (A-89-90) Out of concern for the frequently encountered problem of a clerk entering judgment long after a judgment had been rendered by the judge, the Committee voted to amend Rule 58(c) so as to make judgments effective at the time of their rendition by the judge. To accomplish this purpose, the Committee amended the Rule to include the "notation of a judgment or order on separately maintained bench notes" as an effective entry of judgment. Given the clear and precise motivation and action of the Advisory Committee in amending Rule 58(c), the trial court's written order of November 5, 1984, should have been considered an effective entry of judgment. It is obvious that Judge Neilson's order was a notation of a judgment or order on his bench notes, given the fact that he had to maintain a separate record of orders and notations pertaining to this case at his office in Linden, Alabama. His determination that Lapeyrouse was entitled to a new trial, and the recordation of that determination in the written order, should have been deemed sufficient to constitute both rendition and entry of the judgment within the ninety-day period of Rule 59.1.

Therefore, without question, the requirements of Rule 59.1 with respect to the "disposal" of a pending post-trial motion within the ninety-day time limitation were significantly altered by the Supreme Court of Alabama in Lapeyrouse's case. Whereas prior to the Alabama court's subject opinion only a written ruling by the trial judge within ninety (90) days was necessary, now ministerial action by the clerk of court within the time limitation is also required. By applying this new, unexpected interpretation

to Lapeyrouse in the case at bar, the Supreme Court of Alabama completely eliminated any opportunity for Lapeyrouse to appeal the adverse impact of the new construction of Rule 59.1.

Furthermore, and perhaps more fundamentally, prior to the new opinion there never existed an adverse judgment from which Lapeyrouse could take an appeal. The Alabama Supreme Court's decision, if permitted to stand, imposes upon Lapeyrouse a burden incapable of attainment and one which egregiously violates Lapeyrouse's due process rights.

B. Lapeyrouse's Valid and Timely Cross-Appeal Was Arbitrarily and Capriciously Dismissed.

Lapeyrouse was denied equal protection of the law when its cross-appeal to Nelson's appeal was dismissed arbitrarily and without justification in conjunction with the issuance of the writ of mandamus. As clearly reflected in the Statement of the Case, Nelson initially appealed from much more than the trial court's Order setting aside the judgment against Lapeyrouse. Nelson also appealed from all other orders and rulings of the trial court adverse to her. Nelson's appeal entitled Lapeyrouse, under Ala. R. App. P. 4(a)(2), to file a cross-appeal within fourteen days from the date of the filing of Nelson's appeal, which Lapeyrouse did. However, when the Alabama Supreme Court determined that the trial court's order setting aside the judgment against Lapeyrouse was not effective, it spontaneously dismissed Lapeyrouse's cross-appeal as untimely. This was done even though Nelson's appeal remained viable as to matters other than the order

setting aside the money judgment—a factor which the Alabama Supreme Court failed and refused to address.

By arbitrarily and capriciously dismissing Lapeyrouse's cross-appeal, the Court deprived Lapeyrouse of a right to appeal which is otherwise afforded every party similarly situated under Alabama appellate law and practice. Unfortunately, the Court without explanation rebuffed Lapeyrouse at every turn—never once allowing Lapeyrouse to pursue its statutory right to appeal. In so doing, the Alabama Supreme Court unquestionably deprived Lapeyrouse of equal protection of the law under the Fourteenth Amendment. *Lindsey v. Normet,* 405 U.S. at 77.

CONCLUSION

Under circumstances rife with injustice, the Alabama high court has steadfastly refused to recognize Lapeyrouse's federal constitutional right to appeal from the judgment retroactively entered against it. The two subject Alabama Supreme Court decisions which effectively reinstate the judgment against Lapeyrouse are in marked conflict with applicable decisions of this Court. For the reasons stated herein, the writ of certiorari should issue

and, upon review, the judgments of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1985

Ex parte Flora Jane Nelson
d/b/a W. J. Nelson Company

PETITION FOR WRIT OF MANDAMUS

(In Re: Flora Jane Nelson,
d/b/a W. J. Nelson Company

84-424 v.

Lapeyrouse Grain Corporation
Lapeyrouse Grain Corporation of Alabama, et al.)

(Filed September 27, 1985)

ADAMS, JUSTICE.

Plaintiff petitions this Court for a writ of mandamus ordering the trial court to vacate its order granting a new trial to defendants, and to reinstate its original judgment. Plaintiff contends that the trial court failed to "dispose of" defendants' motion for new trial within the time limits set forth in Rule 59.1, A.R.Civ.P., and, therefore, that the motion was denied by operation of law. We disagree.

The events leading up to the filing of this petition are as follows:

Plaintiff Flora Jane Nelson, doing business as W. J. Nelson Company, filed suit against Lapeyrouse Grain Corporation, et al., seeking damages for breach of fiduciary duty, as well as an accounting of certain disputed items concerning a running account between them.

On July 26, 1984, trial began in this case in the Circuit Court of Baldwin County, and on July 30, the jury returned a verdict in favor of Nelson for $561,537.47. The judgment on the jury verdict was filed with the Circuit Court of Baldwin County on August 9, 1984. One day prior, on August 8, defendants filed a motion for judgment notwithstanding the verdict and a motion for new trial.

Following a hearing on the post-trial motions, the trial court decided to grant defendants' motion for new trial. On November 5, 1984, the words: "Order granting motion for a new trial" were entered on the civil docket. The court also executed an order granting defendants' motion, which was dated November 5, 1984, but was not filed with the circuit court until November 8, 1984.

Plaintiff contends that where a separate written order is entered, it should take precedence over a mere entry in the civil docket, and cites as authority the case of *Lacks v. Stribling*, 406 So. 2d 926 (Ala. Civ. App. 1981). If the separate order is indeed preferred, plaintiff asserts, then Rule 59.1, A.R.Civ.P. operates to preclude a grant of defendants' motion for new trial in this case, because the order was not filed until November 8, 1984—two days after the applicable time period had expired. Rule 59.1, A.R.Civ.P., reads:

> No post-judgment motion filed pursuant to rules 50, 52 or 59 shall remain pending in the trial court for more than 90 days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to dispose of any pending post-judg-

> ment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.

Plaintiff argues that, according to Rule 59.1, the motion for new trial was denied on November 6, 1984.

Defendants do not contest the fact that, according to Rule 59.1, if the motion for new trial had not been "disposed of" on or before November 6, 1984, then it was denied by operation of law. Defendants contend that neither the Alabama Rules of Civil Procedure nor *Lacks v. Stribling, supra,* requires that a written order be filed within the 90-day period; they say all that is required is that the motion be ruled upon. Further, defendants argue, even though Rule 59.1 does not require that there be an *entry* of judgment, according to Rule 58(c), A.R.Civ.P., judgment was entered in this case when the words "order granting motion for a new trial" were recorded on the case action summary sheet along with the date, November 5, 1984.

Rule 58, A.R.Civ.P., deals with the rendition and entry of judgments and orders, and provides:

> (a) *Rendition of judgments and orders.* A judge may render his order or judgment: (1) by notation thereof upon his bench notes without any other or further written document, or (2) by executing a separate written document, or (3) by including the order or judgment in his opinion or memorandum, or (4) by simply appending to his opinion or memorandum or including therein his direction as to the order or judgment sought to be entered.

. . . .

> (c) *Entry of judgment or order.* Upon rendition of a judgment or order as provided in subdivision (a) of this rule, unless it contains a specific direction otherwise or is subject to the provisions of rule 54(b), the clerk shall note such judgment or order forthwith in the civil docket if separately maintained. Notation of a judgment or order on separately maintained bench notes or in the civil docket or the filing of a separate judgment or order constitutes the entry of the judgment or order. The entry of the judgment or order shall not be delayed for the taxing of costs.

Thus, the trial court had the option of entering its judgment by recording it in the civil docket or separate bench notes, or by filing a separate order. In this case, the court chose to both enter the order in the civil docket and to file a separate order. We are of the opinion that when a trial court employs two separate methods of entering judgment, and both are within the statutorily-prescribed time limits, one must certainly take precedence over the other to allow attorneys to properly compute the time period in which to file for the applicable post-trial relief.

In *Lacks v. Stribling, supra,* the Court of Civil Appeals was presented with facts similar to those in the case *sub judice,* and addressed the problem by stating:

> A separate judgment may be signed by the trial judge, but it is not effective until he authorizes that it be filed with the clerk or register, even if the filing date is several days, weeks or even months later than the date reflected on the judgment. When a separate judgment is filed, the filing thereof constitutes the entry of the judgment and would take preference over an additional attempted entry thereof by the clerk or register by any other method of entering authorized by Rule 58(c). To hold as contended by Lacks would mean that, if adequate time differed between the date

> of the entry by the clerk on the case action summary and the date of the filing of the separate judgment, the clerk could effectively eliminate a motion for a new trial (if the difference was more than thirty days) or even an appeal (if the difference was more than forty-two days). Such a construction is contrary to the spirit of modern judicial philosophy. Rule 1(c), A.R.C.P.; Rule 1, A.R.A.P.

406 So. 2d at 930. The court went on to say:

> We determine that the judgment dated July 2 was entered when it was filed by the register on July 9, that such entry prevails and we are not governed in this matter by the actions of the register in placing the July 2 date and "Order of the Court" on the case action summary, and that the Stribling motion of August 8 was timely filed.

406 So. 2d at 930.

The decision in *Lacks* is important for two reasons. First, it states the rule that when a separate order is executed by the trial court, it is not effective until it is filed with the clerk or register. See also *Holmes v. Powell*, 363 So. 2d 760 (Ala. 1978). There are obvious policy reasons which support this rule. For example, until the order is filed, it can be altered or even thrown away and a new order substituted in its place. Also, the parties to the litigation are only notified of the order after it is filed with the clerk. Therefore, the order would have to be filed before it could be considered to have finally "disposed of" the motion.

Second, in a siuation where both an entry on the docket as well as a separate order are used, in accordance with Rule 58, A.R.Civ.P., *Lacks* establishes the date on which to begin calculating the time period for filing post-

trial motions or notice of appeal as that date when the separate judgment was filed: "When a separate judgment is filed, the filing thereof constitutes the entry of judgment *and would take preference over an additional attempted entry* . . . ." As the court pointed out, a situation could present itself where a motion for new trial might be eliminated due to the time difference between the entry on the docket and the filing of the order. Also, it is common practice for attorneys seeking relief to draft the order granting such relief, so that all the trial judge need do is sign the document. This could possibly lead to a situation where the date typed on the order by the attorney/draftsman is not the same as the date on which the order was signed and filed by the judge. It is plausible that this could lead to confusion on the part of the attorneys in their attempt to comply with the requirements of the rules. Thus, if we hold otherwise, Rule 59.1, A.R. Civ.P. would be rendered ineffective. In order to avoid such a situation, the court of appeals held in *Lacks* that the judgment was entered when it was filed with the register, notwithstanding any entry on the docket of a different date. By adhering to this rule, we not only further the purpose of Rule 59.1, but we enable those affected by these particular rules to properly calculate the time period.

Furthermore, defendants have cited no authority as to why the time deadlines contained in our rules should not apply to judges in the same manner that they apply to attorneys. Therefore, we are of the opinion that a trial judge must, if a separate written order is executed, file that order within the 90-day period set out in rule 59.1 in order that it be given effect, and if the court does so

file, this separate order would take precedence over an entry in the civil docket.

Notwithstanding the above-stated rationale, the date on which the order was entered on the civil docket, November 5, 1984, is the date which controls in the instant case. We reach this conclusion because the separate order was not filed with the circuit court until November 8, 1984—two days after the 90-day period had expired. According to Rule 59.1, the trial court could have lost jurisdiction of the matter on November 6, 1984, the 90th day, and therefore its order filed two days later would have been a nullity; as a nullity it should not serve to eradicate the court's order entered on the civil docket on November 5, 1984. Had the separate order been filed prior to the 90th day, then, in accordance with this opinion, the date the separate order was filed would have controlled. Inasmuch as this was not the case, however, the court's proper entry of judgment on the civil docket granted defendants' motion for new trial within the time limits set forth by Rule 59.1, A.R.Civ.P. Therefore, the writ of mandamus is due to be, and it is hereby, denied.

WRIT DENIED.

Torbert, C. J., Maddox, Faulkner, Jones, Almon, Shores, and Beatty, JJ., concur.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

Ex parte Flora Jane Nelson
d/b/a W. J. Nelson Company

PETITION FOR WRIT OF MANDAMUS

(In Re: Flora Jane Nelson,
d/b/a W. J. Nelson Company

84-424 v.

Lapeyrouse Grain Corporation,
Lapeyrouse Grain Corporation of Alabama, et al.)

On Rehearing Ex Mero Motu

(Filed October 11, 1985)

PER CURIAM.

The original opinion is withdrawn, and the following is substituted therefor:

The single issue presented in this petition for writ of mandamus is whether the trial court's order granting defendants' motion for new trial is void as a matter of law. We hold that it is and grant the petition for writ of mandamus.

The action was commenced on January 27, 1983, when plaintiff Flora Jane Nelson filed suit against defendants Lapeyrouse Grain Corporation, et al. The case was tried to a jury, which returned a verdict on July 30, 1984, in favor of plaintiff Nelson and assessed damages in the amount of $561,537.47. Judgment was entered on the verdict on August 9, 1984. On August 8, 1984, defendants filed post-trial motions for new trial and judgment not-

withstanding the verdict.[1] November 6, 1984, was the ninetieth day after the filing of the defendants' post-trial motions, significant because Rule 59.1, A.R.Civ.P., as here pertinent, mandates:

> "No post-judgment motion . . . shall remain pending in the trial court for more than 90 days . . . . A failure by the trial court to dispose of any pending post-judgment motion within the time permitted hereunder . . . shall constitute a denial of such motion as of the date of the expiration of the period."

The trial judge drafted and signed an order granting the motion for new trial, which was dated November 5, 1984, but this document was not filed with the circuit clerk until November 8, 1984.

Plaintiff filed a notice of appeal and this petition for writ of mandamus. The defendant Lapeyrouse filed a cross-appeal from the order of the trial court denying its motion for judgment notwithstanding the verdict. For the reasons set out below, the plaintiff's appeal is due to be dismissed, and the writ of mandamus is due to be issued. The defendant Lapeyrouse's cross-appeal from the order denying its motion for judgment notwithstanding the verdict is due to be dismissed because it was not filed within forty-two days of the order appealed from. It is interesting that the notice of cross-appeal expressly recognizes, and correctly so, that Lapeyrouse appeals "from the trial court's denial of said defendants' motions for judgment notwithstanding the verdict . . . which denial . . . oc-

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[1] *Board of Water and Sewer Commissioners of the City of Mobile v. Alabama Power Co.*, 363 So. 2d 304, 307 (Ala. 1978), held that "[a] motion is timely even though made before the entry of an order if the court has previously indicated the order which it will make."

curred as a matter of law on November 6, 1984, pursuant to ARCP Rule 59.1." The notice of cross-appeal was filed on December 26, 1984, beyond forty-two days from November 6, 1984. The plaintiff's superfluous notice of appeal from the purported order granting the motion for new trial would not support an appeal—which the plaintiff recognized and, therefore, filed the petition for writ of mandamus—and does not operate to extend the time for filing the cross-appeal under A. R. A. P. Rule 4(a)(2).

Under the decision of this Court, e.g., *Holmes v. Powell,* 363 So. 2d 760 (Ala. 1978), the effective date for purposes of computing time under the Rules of Civil and Appellate Procedure is the date the order is filed—in this case November 8, 1984, the date it was stamped filed in the circuit clerk's office. In a strikingly similar case, *Lacks v. Stribling,* 406 So. 926 (Ala. Civ. App. 1981), the Court of Civil Appeals stated:

> "A separate judgment may be signed by the trial judge, but it is not effective until he authorizes that it be filed with the clerk or register, even if the filing date is several days, weeks or even months later than the date reflected on the judgment. When a separate judgment is filed, the filing thereof constitutes the entry of the judgment and would take preference over an additional attempted entry thereof by the clerk or register by any other method of entering authorized by Rule 58(c). To hold as contended by Lacks would mean that, if adequate time differed between the date of the entry by the clerk on the case action summary and the date of the filing of the separate judgment, the clerk could effectively eliminate a motion for a new trial (if the difference was more than thirty days) or even an appeal (if the difference was more than forty-two days). Such a construction is contrary to the spirit of modern judicial philosophy. [Citations omitted.]

> "We determine that the judgment dated July 2 was entered when it was filed by the register on July 9, that such entry prevails and we are not governed in this matter by the actions of the register in placing the July 2 date and 'Order of the Court' on the case action summary, and the Stribling motion of August 8 was timely filed."

406 So. 2d at 930.

Defendant Lapeyrouse's argument that the entry on the case action summary sheet was an effective disposition of the post-trial motion within the ninety days allowed by Rule 59.1 is not sound. That entry is in words and figures as follows: "11/5/84 order granting motion for new trial." This is not an order disposing of the post-trial motion under Rule 59.1, supra. Under Rule 58(b), as amended, effective March 1, 1984, such entry would have been effective "if it is signed or initialed by the judge and indicates an intention to adjudicate." Inasmuch as the entry does not meet the requirements of Rule 58(b), it did not have the effect of disposing of the post-trial motion, and that motion was overruled as a matter of law on November 6, 1984, the ninetieth day after the motion was filed and undisposed of by order of the trial court.

The writ of mandamus is granted. For the reasons stated, the appeal in Case No. 84-294, *Nelson v. Lapeyrouse Grain Corp.*, and the cross-appeal, Case No. 84-342, *Lapeyrouse Grain Corp. v. Nelson*, will be dismissed.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; WRIT GRANTED .

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, and Houston, JJ., concur.

Beatty and Adams, JJ., not sitting.

84-424—*Ex Parte Flora Jane Nelson, etc.*

ON APPLICATION FOR REHEARING

(Filed November 22, 1985)

PER CURIAM.

APPLICATION OVERRULED.

Maddox, Faulkner, Jones, Almon, Shores, and Houston, JJ., concur.

Torbert, C.J., concurs specially.

Beatty and Adams, JJ., not sitting.

ON APPLICATION FOR REHEARING

TORBERT, CHIEF JUSTICE (concurring specially).

After carefully reviewing the briefs submitted in support of Lapeyrouse's application for rehearing, I agree that the application should be overruled. However, I think it is appropriate to respond to some of Lapeyrouse's contentions.

The argument that A.R.Civ. P. 59.1 does not specifically require entry of judgment but rather refers to disposing of the motion was carefully considered. Rule 59.1 applies to motions filed pursuant to Rules 50, 52, 55, and 59. Rule 59.1 most likely refers to "disposing" of the motion because "disposing" of is a catch-all term which encompasses all the possible actions the trial court could take in acting on the various motions to which Rule 59.1 applies. The trial court can act on the motion by ruling on it in any of the means set out in A.R.Civ. P. 58(a). However, the order or judgment is not effective for the purpose of disposing of the motion until there is an entry of the judgment or order. This must be the rule.

Although A.R.Civ. P. 58 differs in substance from F.R.Civ. P. 58, both rules are intended to resolve the same problem, *i.e., when* is an order or judgment an order or judgment:

> "Rule 58 is intended to resolve 'the old, old question of when is a judgment a judgment.' It is of great importance in litigation to know precisely what the judgment is and when it was entered. The time in which to make post-trial motions runs from the entry of judgment as does the time when execution may issue. Most important, however, is the fact that the time for appeal runs from the entry of the judgment."

11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2781, at 6 (1973). Time limitations for the filing of post-judgment motions and appeals begin running upon entry of judgment. A.R.Civ. P. 50(a), 55(c), 59(b), 59(e); A.R. App. P. 4(a), 5(a). In Alabama an aggrieved party can appeal from the grant of a new trial. Code 1975, § 12-22-10. In order to eliminate confusion as to when a motion was disposed of, the order or judgment is not effective until there has been an entry of judgment.

Lapeyrouse also contends that this decision has been widely criticized by trial judges because it makes it difficult for judges sitting outside their hometowns to render orders or judgments. Rule 58 was written as it is in order to conform with what was the existing practice before the rules of civil procedure were adopted. See committee comments to A.R.Civ. P. 58. In sanctioning the many methods of rendering and entering orders and judgments, the rules retreated from the supposed goal of creating certainty as to when an order or judgment came into existence. For comparison, see F.R.Civ. P. 58, which,

while admittedly somewhat ritualistic, promotes certainty. In any event the trial court in this case could have used one of the other methods provided for in Rule 58 to ensure that his ruling was effective before the 90-day period set out in Rule 59.1 expired.

October 11, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

(Filed December 11, 1985)

BALDWIN CIRCUIT COURT
#CV 83-500016

84-342

LAPEYROUSE GRAIN CORPORATION

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON CO.

IT IS CONSIDERED, ORDERED AND ADJUDGED that the appeal in this cause be, and the same is hereby, dismissed on the authority of the opinion issued this day in 84-424—Ex Parte: Flora Jane Nelson, d/b/a W. J. Nelson Company, Petition for Writ of Mandamus, (In Re: Flora Jane Nelson, d/b/a W. J. Nelson Co. v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al.).

IT IS FURTHER ORDERED AND ADJUDGED that the appellant pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 10 day of December 1985.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

October 11, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

(Filed December 11, 1985)

BALDWIN CIRCUIT COURT
#CV 500016

84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

v.

LAPEYROUSE GRAIN CORPORATION and
LAPEYROUSE GRAIN CORPORATION OF
ALABAMA

IT IS CONSIDERED, ORDERED AND ADJUDGED that the appeal in this cause be, and the same is hereby, dismissed on the authority of the opinion issued this day in 84-424—Ex Parte: Flora Jane Nelson, d/b/a W. J. Nelson Company, Petition for Writ of Mandamus, (In Re: Flora Jane Nelson d/b/a W. J. Nelson Co. v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al.).

IT IS FURTHER ORDERED AND ADJUDGED that the appellant pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the Instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 10 day of December 1985.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

October 11, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

BALDWIN CIRCUIT COURT
#CV 83-500016

(Filed December 11, 1985)

84-424

EX PARTE: FLORA JANE NELSON d/b/a W. J. NELSON COMPANY

PETITION FOR WRIT OF MANDAMUS

(In Re: Flora Jane Nelson, d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al.)

This cause having been placed on rehearing ex mero motu, it is now considered that a writ of mandamus is due to be granted.

IT IS ORDERED that the opinion issued in this case on September 27, 1985, be withdrawn, and the opinion issued today be substituted therefor.

IT IS, THEREFORE, ORDERED that the Honorable Claud D. Neilson, Circuit Judge, enter an order setting aside his order dated November 5, 1984, which granted a motion for new trial in the case of Flora Jane Nelson, d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al., Baldwin Circuit Court Case No. CV 83-500016.

IT IS FURTHER ORDERED that the respondents pay the costs of this proceeding, for which let execution issue.

OPINION PER CURIAM
TORBERT, C.J., MADDOX, FAULKNER, JONES, ALMON, SHORES & HOUSTON, JJ., CONCUR; BEATTY AND ADAMS, JJ., NOT SITTING.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 10 day of December 1985.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

JANUARY 28, 1986

BALDWIN CIRCUIT COURT
CV-83-500016

85-393

LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA

v.

FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY

ORDER

IT IS ORDERED, on motion of the appellee, that the appeal in this cause be, and the same is hereby, dismissed.

IT IS FURTHER ORDERED that the requests of the appellee for the 10% affirmance damages and damages for frivolous appeal are denied.

IT IS FURTHER ORDERED that costs be taxed against the appellant as provided by the Alabama Rules of Appellate Procedure.

Torbert, C.J. and Maddox, Faulkner, Jones, Almon, Shores, Beatty, JJ., concur.
Houston, J., dissents
Adams, J., not sitting

NO ADDITIONAL COSTS IN SUPREME COURT

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 28th day of June 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON,
d/b/a W. J. NELSON COMPANY,

Plaintiff,

Vs.

LAPEYROUSE GRAIN CORPORATION, et al.,

Defendants.

PRE-TRIAL ORDER

This cause was scheduled for pre-trial conference on Monday, July 16, 1984, in Linden, Alabama. Present were the plaintiff, her attorney, Robert Alton, and Caine O'Rear, III for the defendants. The Court determined the plaintiff's theories of recovery to be:

1. An accounting between the parties.

2. Breach of Contract. Plaintiff contends that her deceased husband ordered defendant to sell unpriced soybeans, he had previously sold to defendant, at a certain price prior to his death, and defendant failed to sell the beans and, therefore, breached the contract.

3. Conversion. Plaintiff contends that defendant converted the soybeans owned by her hsuband to his own use.

4. Common counts.

The plaintiff contends that she was not a partner with her deceased husband and that he operated his business as a sole proprietorship. Mr. Nelson died testate, and Mrs. Nelson was appointed executrix by the Baldwin County

Probate Court. The estate has been settled and closed out in the Probate Court. No claims were filed against the estate by defendant. The estate of W. J. Nelson is not a party to this lawsuit, and plaintiff's attorney informed the Court that this action was brought by Mrs. Nelson, in her individual capacity, not as the executrix. Mrs. Nelson was the sole beneficiary of the Will of Mr. Nelson. Mrs. Nelson was appointed executrix after she had filed this action.

Upon consideration of these contentions and undisputed facts, and also upon consideration of all of the pleadings and depositions, the Court is of the opinion that the plaintiff cannot prosecute an action against the defendant for breach of contract, common count, or conversion, based on claims that arose from her husband's business. These causes of action only survive to the personal representative. (Title 6-5-462 *Code of Alabama* 1975). Mrs. Nelson has elected to proceed only in her individual capacity, therefore, all of these claims must be dismissed. The action for an accounting is equitable in nature and also concerns claims from transactions after the death of Mr. Nelson. The cause will be tried by the Court without a jury.

The defendant has filed a counterclaim against the plaintiff. The defendant contends that plaintiff was a partner with her husband and that she owes the defendant money from their previous business dealings. This cause will be tried by jury. The other issues will be tried by the Court without a jury.

Plaintiff has filed a defense to the counterclaim based on Statute of Non-Claims and the Statute of Limitations.

Defendant has filed a Motion to Strike these defenses and also a Rule 11 Motion has been filed by defendant. These Motions to Strike are granted; however, the Rule 11 Motion is denied. The defendant's Motion to Strike the defenses of Title 6-5-186 is also granted.

ALL DONE and ORDERED this, the 16 day of July, 1984.

/s/ Claud D. Neilson
CIRCUIT JUDGE

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON,
d/b/a W. J. NELSON COMPANY,

Plaintiff

Vs.

LAPEYROUSE GRAIN CORPORATION, et al.,

Defendants

JUDGMENT

(Filed August 9, 1984)

This day in open Court came the parties with their attorneys, and this cause having been regularly set for trial for this day, and this cause coming on to be heard and issue having been joined between the plaintiff and the defendants, thereupon, in open Court on this day in the presence of both of the parties with their attorneys, came a jury of good and lawful men and women, to-wit: Benjamin A. Ballard and eleven others, who, having been first duly empanelled and sworn, according to law, and who, having heard the evidence and the charge of the Court, upon their oaths, in open Court on this day in the presence of the plaintiff, defendants and their attorneys, do say: "We, the Jury, find for the plaintiff and against the defendants and assess the plaintiff's damages at $561,537.47. We further find in favor of the plaintiff and against the defendants on the counterclaim."

It is, therefore, ORDERED and ADJUDGED by the Court that the plaintiff do have and recover of the defendants the sum of $561,537.47, the amount of damages as so

assessed by the jury in this cause, and all Court costs in this cause created, for the recovery of which, let execution issue.

It is further ORDERED that a judgment is rendered in favor of the plaintiff on the defendants' counterclaim.

DONE and ORDERED this, the 30th day of July, 1984.

/s/ Claud D. Neilson
CIRCUIT JUDGE

I, Eunice G. Tindal, Register of the Circuit Court of Baldwin County, Alabama, do hereby certify that the foregoing is a correct copy of the original decree rendered by the Judge of the Circuit Court, in the stated cause, which said decree is on file and enrolled in my office.

WITNESS MY HAND AND SEAL this the 10th day of August, 1984

/s/ Eunice G. Tindal
Register of Circuit Court, in Equity

Copies to:
Robt. M. Alton, Jr., Esq.
Caine O'Rear, III, Esq.
Alex F. Lankford, III, Esq.
Chas. C. Partin, Esq.

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiff

Vs.

LAPEYROUSE GRAIN CORPORATION,

Defendant

ORDER GRANTING MOTION FOR NEW TRIAL

After reviewing the briefs, evidence and oral arguments, the Court is of the opinion that the verdict obtained by the plaintiff against the defendant is not substantiated by the evidence and is excessive.

It is, therefore, ORDERED by the Court that the Motion for New Trial, as to the verdict for the plaintiff in the amount of $561,537.47. is set aside and reversed, and a new trial is granted unto the defendant.

The Court is further of the opinion that the verdict of the jury on the counterclaim should also be set aside and vacated. The Court finds that justice requires a retrial of all the issues in this cause.

It is ORDERED by the Court that the Motion for New Trial, as to the counterclaim of Lapeyrouse Grain Corporation, is granted, and the verdict is set aside and reversed.

All DONE and ORDERED this, the 5th day of November, 1984.

/s/ Claud D. Neilson
CIRCUIT JUDGE

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiff,

Vs.

LAPEYROUSE GRAIN CORPORATION,

Defendant.

ORDER GRANTING MOTION FOR NEW TRIAL

(Filed November 8, 1984)

After reviewing the briefs, evidence and oral arguments the Court is of the opinion that the verdict obtained by the plaintiff against the defendant is not substantiated by the evidence and is excessive.

It is, therefore, ORDERED by the Court that the Motion for New Trial, as to the verdict for the plaintiff in the amount of $561,537.47, is set aside and reversed, and a new trial is granted unto the defendant.

The Court is further of the opinion that the verdict of the jury on the counterclaim should also be set aside and vacated. The Court finds that justice requires a retrial of all the issues in this cause.

It is ORDERED by the Court that the Motion for New Trial, as to the counterclaim of Lapeyrouse Grain Corporation, is granted, and the verdict is set aside and reversed.

ALL DONE and ORDERED this, the 5th day of November, 1984.

/s/ Claud D. Neilson
CIRCUIT JUDGE

Copies to:
Caine O'Rear, Esq.
Robt. M. Alton, Esq.

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiffs,

Vs.

LAPEYROUSE GRAIN CORPORATION,
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA, et al.,

Defendants.

ORDER

(Filed December 16, 1985)

In accordance with the Order of the Supreme Court of the State of Alabama directing me to set aside the Order dated November 5, 1984;

It is, therefore, ORDERED that the Order of November 5, 1984 is hereby set aside and voided.

DONE and ORDERED this, the 12th day of December, 1985.

/s/ Claud D. Neilson
CIRCUIT JUDGE

Copies to:
Robert M. Alton, Esq.
Caine O'Rear, III, Esq.
12-13-85

IN THE CIRCUIT COURT FOR
BALDWIN COUNTY, ALABAMA

CASE NO. .....

FLORA JANE NELSON,
d/b/a W. J. Nelson Company,

Plaintiff,

vs.

LAPEYROUSE GRAIN CORPORATION, LAPEYROUSE GRAIN CORPORATION OF ALABAMA, John Doe, Richard Roe, A, B, C, D, E&F, the true names of which latter eight defendants are presently unknown to Plaintiff but will be substituted by amendment when ascertained,

Defendants.

COMPLAINT

The Plaintiff is over the age of twenty-one years and is a resident citizen of Baldwin County, Alabama and operates her business, W. J. Nelson Company, a proprietorship, in Fairhope, Alabama. The Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama are corporations which do business in Baldwin County, Alabama by agent, whose agent of service is George Brothers, 3100 Cottage Hill Road, Mobile, Alabama 36606. The fictitious defendants are persons, firms and corporations whose names at this time are unknown to Plaintiff but who acted in concert with Defendants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, hereinafter referred to as LAPEYROUSE in wrongfully depriving Plaintiff of her property and causing injury to Plaintiff as follows:

1. The Plaintiff's husband, W. J. Nelson, now deceased, operated a business in Fairhope, Alabama under the name of W. J. Nelson Company. This business con-

sisted of buying grains and soybeans and other produce produced locally from local farmers and in turn re-sold the items purchased to Defendants LAPEYROUSE. At the death of her husband Plaintiff succeeded to the operation of the business.

2. Plaintiff has maintained a business relationship with Defendants LAPEYROUSE for a number of years and this relationship consisted of the fact that Defendants LAPEYROUSE would lend advances to the Plaintiff, would take as security against said advances grain and soybeans owned by the Plaintiff and would buy produce from the Plaintiff; would sell Plaintiff's produce upon order, deposit the proceeds of the sale to the credit of Plaintiff after repaying any advances owed by Plaintiff to LAPEYROUSE. Plaintiff further stored produce in the warehouses of LAPEYROUSE until such time as they were sold.

3. Plaintiff avers that over the period of years and by virtue of the very nature of their business transactions a close, confidential relationship between the parties evolved into a fiduciary relationship wherein LAPEYROUSE in fact and in deed acted as the fiduciary for the Plaintiff in the buying and selling of produce owned by Plaintiff, the management of Plaintiff's money, the management of Plaintiff's inventory and Plaintiff relied, without reservation, upon the fiduciary relationship in all of Plaintiff's transactions with Defendants LAPEYROUSE.

4. Plaintiff avers that an account that continued throughout the many years of the relationship between Plaintiff's husband and LAPEYROUSE and was continued thereafter by Plaintiff and that at no time had

either party demanded an accounting or payment from the other.

5. Plaintiff further avers that the fiduciary relationship was such that at any time Plaintiff desired to sell its produce (this decision being based upon the highest market available) the Plaintiff would call the employee of LAPEYROUSE who had exclusive charge of Plaintiff's business and order them to sell, naming the produce, the price and the amount, and that without fail, this was done throughout more than twenty years.

6. Plaintiff avers that on or about November 5, 1980, LAPEYROUSE was notified by Plaintiff to sell 49,654½ bushels of soybeans at a market price of $9.37 per bushel for a total sale of $465,262.66.

7. Plaintiff believed that the sale was consummated as every sale had been over more than twenty years of business transactions, this transaction being no different than all other sale transactions.

8. Plaintiff avers that Defendants LAPEYROUSE confirmed to Plaintiff on several occasions that the sale had been consummated and that Plaintiff's account had been givn full credit in the amount of $465,262.66.

9. Plaintiff avers that in the summer of 1982 she received from the auditors of Defendants LAPEYROUSE a statement showing her account to be much higher than it should have been and at a figure that had not given her credit for the November 5, 1980 sale as aforesaid. Defendants LAPEYROUSE assured Plaintiff that this was a bookkeeping error and told her not to worry about it.

10. Plaintiff avers that some two or three months later she discovered that Defendants LAPEYROUSE or

one of its agents, servants or employees had forged her name to the audit statement and purported to verify the false account.

11. Plaintiff further avers that Defendants LAPEYROUSE wrongfully claim that the Plaintiff is indebted to Defendants LAPEYROUSE in an amount of $1,403,505.88 which consists of the following charges:

Advances	$942,000.00
Interest	354,820.25
Handling Chgs.	106,685.63

12. Defendants LAPEYROUSE have wrongfully charged to the account of the Plaintiff the sum of $36,000.00 which was a loan to LAPEYROUSE' employee Ann Greenfield and not an advance to Plaintiff.

13. Plaintiff further avers that there are other contracts which have been sold by LAPEYROUSE for which Plaintiff has not been given credit.

14. Defendants LAPEYROUSE now aver that the 49,654½ bushels of soybeans which were to be sold at $9.37 per bushel on November 5, 1980 are still in inventory and that the market price for these soybeans at the present time is $5.95 per business or $169,818.39 of less value to Plaintiff today than they were on November 5, 1980 and that Defendants LAPEYROUSE has charged Plaintiff interest of $230,800.20 on the $465,262.66 which the Plaintiff was due to have credited to her account on November 5, 1980 and has further wrongfully charged Plaintiff $23,527.47 interest on $36,000.00 to their employee Ann Greenfield and has wrongfully charged Plaintiff an unknown amount for handling charges on the 49,654½ bu-

shels of soybeans that should have been sold on November 5, 1980.

15. Plaintiff further avers that by Defendants LAPEYROUSE' own records, they owe Plaintiff $86,842.53 but have not credited any interest to Plaintiff's account for such funds due Plaintiff.

16. Plaintiff avers that Defendants LAPEYROUSE are indebted to Plaintiff and that Plaintiff is not indebted to Defendants LAPEYROUSE; that Defendants LAPEYROUSE are holding several thousand bushels of corn and soybeans belonging to Plaintiff whose market value far exceeds any balance due to Defendants LAPEYROUSE.

17. Plaintiff further avers that Plaintiff has on numerous occasions presented the information to Defendants LAPEYROUSE asking them to correct the account, giving full credit on her account and removing the unfair charges from her account which Defendants LAPEYROUSE has failed and refused to do.

18. Plaintiff further avers that on or about, to-wit: January 20, 1983, while Plaintiff and Defendants LAPEYROUSE had contracted to do business as they had for twenty years, Plaintiff sent to Defendants LAPEYROUSE grain and soybeans deposited with Plaintiff by local farmers whose names were on each individual ticket along with Plaintiff and that Defendants LAPEYROUSE, without warning, breached its fiduciary duty to Plaintiff and her farmer customers by confiscating the grain and soybeans, refusing to make payment to the farmers and wrongfully applying the value of the grain and soybeans to the false account of the Plaintiff thereby wrongfully converting to its use the property of others including Plaintiff.

19. Plaintiff avers that the willful and wanton acts of Defendants LAPEYROUSE have destroyed her business and have destroyed the confidence her customers had in her business which has been built up over the last thirty years and caused her irreparable harm and injury and that each day it continues to exist is increasing the damages that Plaintiff and Plaintiff's customers are suffering.

20. Plaintiff avers that she has made several efforts to talk with the President other officials of Defendants LAPEYROUSE to get them to desist from the wrongful confiscation of the property and they have refused to do so and stated they plan to continue to do same.

21. Plaintiff avers that this is harvest season for her customers and it is critical on a day to day basis that the farmers be allowed to sell their produce without having their grain, etc. wrongfully confiscated by LAPEYROUSE and therefore Plaintiff avers that it is essential and absolutely necessary if her business is to continue to operate and the farmers of this area are to have any relief that a temporary restraining order be granted by this Court, restraining Defendants LAPEYROUSE, its officers and agents from confiscating any grain or soybeans or the money resulting from their sale and applying said money and/or grain to any account of the Plaintiff, but to pay the money immediately over to Plaintiff and the farmers upon their delivery and to order the release by Defendants LAPEYROUSE of any and all funds so withheld since January 20, 1983, ordering those funds to be paid to Plaintiff.

Plaintiff claims of Defendants the sum of $1,000,000.00 as compensatory damages and the sum of $25,000,000.00

as punitive damages together with costs and interest thereon.

/s/ Flora Jane Nelson

/s/ Robert M. Alton, Jr.
Attorney for Plaintiff
Suite 302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104

/s/ Seymore Trammell
Attorney for Plaintiff
305 South Lawrence Street
Montgomery, Alabama 36104

PLAINTIFF DEMANDS TRIAL BY JURY.

/s/ Robert M. Alton, Jr.

STATE OF ALABAMA
COUNTY OF BALDWIN

I, the undersigned Flora Jane Nelson, being first duly sworn, depose and say:

I am a resident citizen of Baldwin County, in the State of Alabama. I am the Plaintiff named in the foregoing Complaint, I have read over the Complaint, and the facts stated therein are true and correct according to my information, knowledge and belief.

/s/ Flora Jane Nelson

SWORN TO AND SUBSCRIBED before me this the — day of January, 1983.

Notary Public

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. 83-500016

FLORA JANE NELSON d/b/a
W. J. NELSON COMPANY,
Plaintiff,

vs.

LAPEYROUSE GRAIN CORPORATION,
et al.,
Defendants.

POST-TRIAL MOTIONS

Come now defendants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively called "Lapeyrouse") and move the Court to enter judgment in favor of Lapeyrouse as to each claim asserted by and against Lapeyrouse notwithstanding the verdicts on the plaintiff's complaint and Lapeyrouse's counterclaim. In the alternative, if judgment n.o.v. is not entered in favor of Lapeyrouse with respect to all claims by and against it, then Lapeyrouse moves the Court to set aside the verdict and any judgment entered thereon as to each claim for which judgment n.o.v. is not granted and to grant a new trial as to each such claim.

I. *Plaintiff's Claims*

A. Judgment n.o.v.

Lapeyrouse moves the Court to set aside the verdict and judgment in favor of plaintiff for $561,000 and to enter judgment in favor of Lapeyrouse as to each claim for relief made by the plaintiff against Lapeyrouse. The following grounds are submitted in support of this motion:

1. There was not a scintilla of evidence upon which the jury could base its verdict in favor of plaintiff. Furthermore, the verdict cannot be sustained on any reasonable hypothesis of fact established by the evidence. There was absolutely no evidence to support a verdict in favor of plaintiff in the amount of $561,000.

2. Despite the Court's instructions and evidence to the contrary, the verdict was computed by awarding plaintiff the proceeds of the "sale" of 49,654.5 bushels of soybeans at $9.37 per bushel which the plaintiff contended in her pleadings occurred on November 5, 1980, plus interest thereon at 6% per annum to the date of trial.

3. There was absolutely no evidence that the said "alleged sale" of November 5, 1980 occurred or that the parties agreed to such a sale. The only references to the alleged November 5, 1980 transaction during the entire trial were by way of argument of counsel or by hypothetical question.

4. The jury's verdict directly contravened express instructions of the Court (i) to disregard any reference to the alleged November 5, 1980 transaction and (ii) to not give plaintiff credit for said transaction. The jury was instructed several times during the trial and at the conclusion of the case that they could not base any verdict upon a sum which would, as plaintiff contended, be due her as a result of the alleged sale of 49,654.5 bushels of soybeans on November 5, 1980. In spite of these clear and direct instructions, the jury's verdict was based upon this very transaction.

5. It was affirmatively shown by the undisputed evidence that there was no writing signed by Lapeyrouse to confirm the sale of 49,654.5 bushels of soybeans on November 5, 1980.

6. Despite the Court's instructions and evidence to the contrary, the jury's verdict did not reflect any setoff in favor of Lapeyrouse for money paid and credited to plaintiff after October 9, 1981 for beans or other grain delivered to Lapeyrouse by W. J. Nelson Company prior to October 9, 1981.

7. The evidence was that $916,348.67, at minimum, was paid or credited to the plaintiff by Lapeyrouse after October 9, 1981 for soybeans or other grain delivered to Lapeyrouse by W. J. Nelson Company prior to October 9, 1981. The plaintiff herself testified that at least $600,000 has been paid to her by Lapeyrouse since October 9, 1981 for beans or other grain delivered to Lapeyrouse by W. J. Nelson Company prior to October 9, 1981, although she could not state the exact figure nor testify how it was calculated. In any event, the jury's verdict in favor of the plaintiff for $561,000 does not reflect, and cannot be reconciled to reflect, any setoff in favor of Lapeyrouse for such sums paid to the plaintiff.

8. The jury's verdict directly contravened the express instructions of the Court to set off all sums paid or credited to plaintiff by Lapeyrouse after October 9, 1981 for beans and other grain delivered to Lapeyrouse by W. J. Nelson Company prior to October 9, 1981, against all claims of plaintiff against Lapeyrouse.

9. It was affirmatively shown by the undisputed evidence, and admitted by plaintiff, that plaintiff — by her testimony under oath, records and conduct — represented to Lapeyrouse that W. J. Nelson Company was not a sole proprietorship owned solely by her husband prior to his death but rather was a partnership owned by plaintiff and her husband, which representations were relied upon by Lapeyrouse to its detriment. There was absolutely no evidence disputing the fact that such representations were made by plaintiff and that Lapeyrouse relied to its detriment on them. Therefore, the evidence was undisputed that plaintiff was liable to Lapeyrouse as a partnership by estoppel and under no reasonable hypothesis of fact established by the evidence could Lapeyrouse be liable to plaintiff for any amount of damages.

10. There was absolutely no legal evidence offered and admitted to support the plaintiff's claim for money had and received. There was no evidence that Lapeyrouse ever received any money belonging to the plaintiff which was not repaid to the plaintiff.

11. No competent, admissible evidence of recoverable damages sustained by plaintiff in the amount of $561,000.00 or in any amount was introduced.

12. There was no legal theory or claim for relief by plaintiff which entitled plaintiff to trial by jury on any of her claims against Lapeyrouse.

13. The admissible evidence offered and admitted was not legally sufficient to support the jury's verdict in any respect.

14. The verdict was a result of compromise or mistake.

15. The verdict is totally inconsistent with the evidence and legal theories asserted by the plaintiff. The jury was not entitled under the facts or the law to give the plaintiff credit for the November 5, 1980 transaction and yet not find that W. J. Nelson Company was a partnership by estoppel or a partnership in fact owned by the plaintiff and her husband prior to October 9, 1981.

16. There was no evidence introduced at trial which, if believed, would support the jury's verdict of $561,000 in favor of plaintiff.

17. Lapeyrouse adopts by reference all grounds asserted in its oral and written motions for directed verdict in its favor as to each of the plaintiff's claims for relief.

B. *Alternatively, New Trial*

Alternatively, Lapeyrouse moves the Court to order a new trial with respect to each claim for relief made by plaintiff against Lapeyrouse. (In the event that Lapeyrouse's motion for judgment n.o.v. *is* granted, the Court should indicate, pursuant to Rule 50(c)(1), whether a new trial should be had if the judgment is thereafter reversed or vacated.) The grounds for this motion are as follows:

1. Lapeyrouse adopts by reference all grounds set forth above in support of its motion for judgment n.o.v.

2. For the above stated reasons:

a. The verdict is contrary to the great weight and preponderance of the evidence.

b. The verdict constitutes a gross miscarcariage of justice.

c. The verdict is contrary to the law and instructions of the Court.

d. The verdict is wholly wrong and unjust.

e. The verdict is contrary to the law and the evidence.

f. The verdict is a clear result of passion and prejudice and not the result of careful an impartial deliberation.

g. The verdict is so excessive as to shock the conscience and is unsupported by the evidence.

h. The verdict constitutes irreparable injustice for Lapeyrouse and is the result of inadvertence, forgetfulness or intentional or capricious disregard of the evidence and/or the instructions of the Court.

3. The Court erred in its oral charge and instructions to the jury by not instructing the jury, at the time of advising the jury concerning the verdict form if a verdict were rendered in favor of the plaintiff, that Lapeyrouse was entitled to a setoff for all sums paid or credited to plaintiff by Lapeyrouse after October 9, 1981 for beans and other grain de-

livered to Lapeyrouse by W. J. Nelson Company prior to October 9, 1981. This error misled the jury into believing that a verdict could be rendered in favor of the plaintiff without giving Lapeyrouse credit for such a setoff, contrary to the Court's prior instructions.

II. *Lapeyrouse's Claims*

A. *Judgment n.o.v.*

Lapeyrouse moves the Court to enter judgment in favor of Lapeyrouse as to each claim for relief made in its counterclaim in the amount of $1,088,299.15 or, alternatively, in a lesser amount calculated by using 6% per annum as the appropriate interest rate charged against advances. The following grounds are submitted in support of this motion:

1. Lapeyrouse adopts by reference all grounds set forth above in support of its motion for judgment n.o.v. as to the plaintiff's claim.

2. The following evidence was introduced at trial and was undisputed by the plaintiff: that Lapeyrouse had loaned and advanced $906,000.00 ($942,000.00 less $36,000) in principal to W. J. Nelson which had not been repaid; that books and records of both plaintiff and Lapeyrouse confirmed this fact; and that $113,633.02 for handling charges, $699.25 in weighing and inspection fees and $2,191.17 in discounts had been incurred and charged to the plaintiff by Lapeyrouse, which amounts had not been paid by the plaintiff.

The evidence was further undisputed that Lapeyrouse had charged the plaintiff interest on the ad-

vances at the rate of 8% per annum prior to May 1, 1980 and 18% per annum after that date. At such rates, the interest due and payable to Lapeyrouse by the plaintiff at the time of trial was $600,247.64. The only dispute concerning interest was whether the plaintiff had agreed to pay the rates charged by Lapeyrouse. The plaintiff admitted Lapeyrouse was entitled to interest.

3. The evidence was further undisputed that only $570,441.93 had been paid to Lapeyrouse on the monies owed by plaintiff to Lapeyrouse, as set forth above. This left a balance payable to Lapeyrouse by the plaintiff at the time of trial of $1,088,299.15, assuming that the interest should be calculated at the 8%/18% rates.

4. The evidence was undisputed, and admitted by plaintiff, that plaintiff—by her testimony under oath, records and conduct—represented to Lapeyrouse that W.J. Nelson Company was not a sole proprietorship owned solely by her husband prior to his death but rather was a partnership owned by plaintiff and her husband, which representations were relied upon by Lapeyrouse to its detriment.

The evidence was further undisputed that the plaintiff had represented to Lapeyrouse that she was liable for the debts of W. J. Nelson Company which arose before October 9, 1981 and also for those which arose after that date.

There was absolutely no evidence disputing the fact that such representations were made by plaintiff

and that Lapeyrouse relied to its detriment upon them by not filing a claim against the Estate of W. J. Nelson, deceased. Therefore, the evidence was undisputed that plaintiff was liable to Lapeyrouse as a partnership by estoppel for all debts of W. J. Nelson Company which were incurred before and after October 9, 1981.

5. Lapeyrouse adopts by reference all grounds asserted in its motion for directed verdict in its favor as to each claim for relief in the counterclaim.

B. *Alternatively, New Trial*

Alternatively, Lapeyrouse moves the Court to order a new trial with respect to each claim for relief made by Lapeyrouse against plaintiff in its counterclaim. (In the event that Lapeyrouse's motion for judgment n.o.v. *is* granted, the Court should indicate, pursuant to Rule 50 (c)(1), whether a new trial should be had if the judgment is thereafter reversed or vacated.) The grounds for this motion are as follows:

1. Lapeyrouse adopts by reference all grounds set forth above in support of its motions for judgment n.o.v. as to the plaintiff's claims and as to Lapeyrouse's counterclaim and in support of its alternative motion for new trial as to plaintiff's claims.

2. The verdict constitutes a gross miscarriage of justice in that plaintiff was awarded damages against Lapeyrouse despite overwhelming evidence, including numerous admissions by plaintiff prior to trial, that Lapeyrouse was entitled to recover damages of plaintiff, not vice-versa.

/s/ Caine O'Rear III
Attorney for Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama

Oral argument is requested.

/s/ Caine O'Rear III

POST-TRIAL MOTIONS

Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

CERTIFICATE OF SERVICE

I hereby certify that I have on this 7th day of August, 1984, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid.

/s/ Caine O'Rear III

CASE ACTION SUMMARY

— CIVIL —

IN THE CIRCUIT COURT OF BALDWIN COUNTY

Case No. CV 83 500016

DATE	ACTIONS, JUDGMENTS, CASE NOTES
1/26/83	Summons & Complaint
1/26/83	Statement of Atty.
1/26/83	Temporary Restraining Order
1/26/83	Temporary Restraining Order Bond (Flora Jane Nelson)
2/ 2/83	Motion for Forfeiture of Bond against sureties
2/ 2/83	Motion for Atty's fee damages and costs
2/ 2/83	Motion to dissolve temporary restraining order
2/ 2/83	Motion for Preliminary Injunction (Plaintiff's)
2/ 7/83	Plaintiff Motion for Contempt
2/ 7/83	Decree Copy to Caine O'Rear, III. Alton or Trammell in 2/9/83 Copy to Charles personally 2/7/83
2/25/83	Continued from Mar. '83 trial setting. Harry J. Wilters, Jr., Judge
3/ 9/83	Corrective Notice of deposition upon oral examination, Copy to Lankford; Partin; Alton & O'Rear
3/10/83	Court App. Notice (Set: 4/14/83 @ 1:30 P.M. by EN)
3/24/83	Motion to enter judgment by default
4/ 4/83	Defendant's Motion to transfer
4/ 8/83	Affidavit
4/ 8/83	Notice of deposition
4/ 6/83	Deposition of William M. Russell

DATE	ACTIONS, JUDGMENTS, CASE NOTES
4/ 6/83	Deposition of Ann R. Greenfield
4/ 6/83	Deposition of George Raleigh Brothers, Jr.
4/ 6/83	Deposition of Flora Jane Nelson
4/12/83	Motion to Recuse
4/12/83	Affidavits of Flora Jane Nelson and Marianne Nadine Blackword
4/14/83	The Court on motion of the plaintiff RECUSES itself. /s/ Floyd C. Enfingen Circuit Judge
4/14/83	Response To Motion To Transfer
4/14/83	Order of Recusal (Copy to Alton; O'rear; & Partin) on 4/19/83
4/15/83	Deposition on behalf of Pltf's Motion to recuse
4/26/83	Deposition of Flora Jane Nelson
5/12/83	Affidavit
5/12/83	Motion for partial summary Judgment
5/27/83	Order appointing Judge Claud D. Neilsen from Supreme Court
6/27/83	Letter from Judge Neilson, Copy to; Partin; Alton; O'rear and Lankford
7/22/83	Hearing in All Motions (set: 7/29/83 @ 10:00 A.M.)
7/29/83	Deposition of Herbert L. Rabun
8/15/83	Affidavit
8/26/83	Continued from 9/83 trial setting. Harry J. Wilters, Jr., Judge
8/29/83	Order

DATE	ACTIONS, JUDGMENTS, CASE NOTES
8/29/83	Order of Transferal to Mobile
3/22/84	First Amendment to Complaint
3/22/84	Answer to Counter-Claim
3/22/84	Response to Defendant's Motion for summary judgment
3/22/84	Interrogatories
4/12/84	Copy of Opinion from Supreme Court transferring
4/16/84	Defts.' Motion to extend time for response to interrogatories
4/16/84	Defts.' Motion to dismiss and strike
4/16/84	Order vacating Prior Order
4/24/84	Objections to Interrogatories
4/26/84	Notice granting Motion to extend time (Judge Neilson and copies to all)
5/15/84	Pltf's. Motion for Order to compelling answer to Interrogatories
5/23/84	Response to Interrogatories
5/25/84	Motion to Compel Answers to Interrogatories Granted Copy to Etc.
6/14/84	Pre-trial Order Copy to Partin; O'rear, Alton Lankford
6/14/84	Deft's Motion to dismiss and strike (Overruled)
6/14/84	Case Set: 7/26/84 @ 9:00 A.M. (Copies to Partin, O'rear Lankford and Alton
6/26/84	Amendment to Answer
6/26/84	Affidavit
6/26/84	Pltf's. Motion for Summary Judgment

DATE	ACTIONS, JUDGMENTS, CASE NOTES
6/26/84	Memorandum Brief for Support of Motion Mailed copies motion and briefs of 6/26/84 to Judge Neilson
7/ /84	Defts' Answer to first Amendment to Compt.
7/ 8/84	Deft's. Motion for Summary Judgment
7/ 6/84	Brief in support of Motion for summary judgment
7/ 6/84	Section 6-3-20 Motion to transfer
7/ 6/84	Brief in support of Motion to transfer
7/ 6/84	Motion to strike statute of Non-Claim defense
7/ 6/84	Defts' Motion strike section 6-5-186 defense
7/ 6/84	Defts' Motion to strike Statute of Limitation defense
7/ 6/84	Defts' Motion to strike Claim for Punitive damages
7/ 9/84	Affidavit of Wm. M. Russell
7/ 9/84	Rule 11 Motion (deft's.)
7/ 9/84	Brief in support of deft's. Motion to strike Statute of Non-Claims defense and Rule 11 Motion
7/11/84	Pre-trial setting for Hearing Pending Motions (set 7/16/84 @ 2:30 P.M.)
7/16/84	Deft's. Witness list
7/16/84	Deft's. Exhibit list
7/18/84	Original Papers transferred from Mobile County
7/26/84	Pre-trial Order
7/26/84	Deft's. Amended Answer

DATE	ACTIONS, JUDGMENTS, CASE NOTES
7/26/84	Deft's. Motion in Limine
7/26/84	Deft's. Rule 17 Motion
7/30/84	Deft's Motion For Directed Verdict
8/ 8/84	Deft's. Motion for stay of execution and Proceeding to enforce judgment
8/ 8/84	Deft's. Motion to dissolve Preliminary Injunction and to forfeit security
8/ 8/84	Post-trial Motions
7/30/84	Judgment (Copy to Alton; O'rear; Partin and Lankford 8/10/84
8/13/84	Technical Correction of Post trial Motions
8/20/84	Pltf's. Motion to Deny Motion To Set Aside Verdict
8/20/84	Pltf's. Motion To Issue Permanent Inj.
8/20/84	Plt's. Motion For Requirement of Security
9/10/84	Memorandum to attys. on Deft's. Motion for Stay of Execution - Granted
9/10/84	Memorandum on Motion for Summary Judgment (Set in Linden on Oct. 12, 1984 @ 2:00 P.M. (Copy to Alton & O'rear; Partin & Lankford
11/ 5/84	Order granting Motion for a new trial

IN THE CIRCUIT COURT FOR BALDWIN
County, ALABAMA

CIVIL ACTION NO. 83-500016

DATE OF JUDGMENT:

July 30, 1984

DATES OF POST-JUDGMENT ORDERS:

November 5, 1984
December 7, 1984

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiff/Appellant,

vs.

LAPEYROUSE GRAIN CORPORATION; and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Defendants/Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF ALABAMA

(Filed December 13, 1984)

Notice is hereby given that Appellant/Plaintiff, Flora Jane Nelson, d/b/a W. J. Nelson Company, appeals to the Supreme Court of Alabama from the Order of the trial court granting Defendants' motion for new trial dated November 5, 1984, and from the corrected Order granting Defendants' motion for new trial dated December 7, 1984, which were entered in this cause and which set aside a jury's verdict rendered in favor of Plaintiff in this case and which reversed or vacated the trial court's Judgment dated July 30, 1984, which was based upon the jury's ver-

dict. Appellant/Plaintiff further gives notice of appeal from the trial court's pre-trial order and all other orders and rulings of the trial court that were adverse to Appellant/Plaintiff.

Jurisdiction lies in the Supreme Court of Alabama due to the fact that the judgment originally entered in this case exceeded $10,000.00 and that the amount in controversy exceeds $10,000.00.

Filed with this notice of appeal is security for costs of appeal.

/s/ ROGER S. MORROW

/s/ ROBERT M. ALTON, JR.,
Attorneys for Appellant

OF COUNSEL:

WHITESELL, MORROW & ROMINE, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
262-1967

ROBERT M. ALTON, JR.
Suite 302, 555 South Perry Street
Montgomery, Alabama 36104
834-8661

DATE FILED: _____

_____

Certified as a true copy:

_____

CIRCUIT CLERK

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. 83-5000016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiff,

vs.

LAPEYROUSE GRAIN CORPORATION,
et al.,

Defendants.

NOTICE OF CROSS-APPEAL

(Filed December 26, 1984)

Notice is hereby given that defendants/appellees, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, hereby appeal to the Supreme Court of Alabama from the trial court's denial of said defendants' motions for judgment notwithstanding the verdict with respect to the complaint, and each count and cause of action stated therein, against said defendants and with respect to the counterclaim, and each count and cause of action stated therein, against the plaintiff, which denial or denials occurred as a matter of law on November 6, 1984 pursuant to ARCP Rule 59.1.

/s/ Caine O'Rear III
Attorney for Defendants/Appellees
and Cross-Appellants

Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, AL 36601
(205) 432-5511

NOTICE OF CROSS-APPEAL

CERTIFICATE OF SERVICE

I hereby certify that I have on this 21st day of December, 1984, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid.

/s/ Caine O'Rear III

IN THE SUPREME COURT OF ALABAMA

CASE NO.: 84-424

Ex parte FLORA JANE NELSON, etc.,

Petitioners.

In re:

FLORA JANE NELSON, etc.,

Plaintiff,

v.

LAPEYROUSE GRAIN CORPORATION,

Defendants.

AFFIDAVIT

My name is Claud D. Neilson and I am the Presiding Circuit Judge for the Seventeenth Judicial Circuit of the State of Alabama. I have never been a Circuit Judge for the Twenty-Eighth Judicial Circuit, nor have I ever maintained an office in that Circuit or in Baldwin County, Alabama. My office is located in Linden, Alabama.

On May 23, 1983, I was appointed by the Supreme Court of Alabama to hear the case of *Flora Jane Nelson, d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corp., et al.,* Case No. CV-83-500016 in the Circuit Court of Baldwin County, Alabama as an outside judge due to the recusal of both judges in the Twenty-Eighth Judicial Circuit from this case.

I presided over the jury trial of this case which concluded on July 30, 1984. The jury returned a verdict in favor of Nelson (the plaintiff) and against Lapeyrouse (the defendant) in the amount of $561,537.47 and also in favor of Nelson and against Lapeyrouse on Lapeyrouse's counterclaim.

Lapeyrouse filed post-trial motions for judgment n.o.v. and for new trial. Briefs were filed by both parties with respect to these motions and a transcript of the trial testimony was prepared. I heard arguments from both parties regarding these motions in my courtroom in Linden, Alabama. Based upon the evidence presented at trial, it was my opinion that the jury verdicts in favor of Nelson were not supported or substantiated by the great weight and preponderance of the evidence. I, therefore, granted Lapeyrouse's motion for new trial.

On November 5, 1984, I signed the Order which is attached hereto as Exhibit "A" granting Lapeyrouse's motion for new trial. This Order was prepared by my office and not by one of the attorneys in the case.

On November 5, 1984, the Order (Exhibit "A") was mailed by my secretary to Eunice B. Blackmon, Clerk of the Circuit Court of Baldwin County, Alabama, and copies to Robert M. Alton, Jr., attorney for Nelson, and Caine O'Rear, attorney for Lapeyrouse.

In my opinion, Rule 59.1 requires only that the post-judgment motion be *ruled upon* within 90 days of the filing of the motion. This is clearly evidenced by the language of Rule 59.1 which says that "no post-judgment motion . . . shall *remain pending* in the trial court for more than 90 days" and which further says that the trial court (not clerk) shall *"dispose of"* such motion within the time allowed. Additionally, Rule 59(g) clearly states that post-trial motions "remain pending until *ruled upon* by the court (subject to the provisions [i.e., time limitations] of Rule 59.1)."

Therefore, because Lapeyrouse's motion for new trial was indeed *ruled upon* within the 90-day limitation, it did not "remain pending" for more than 90-days and was "disposed of" within the prescribed time limitation.

Obviously, if I had thought that Rule 59.1 required more, I would have had the Order hand delivered on November 5, 1984 from my office in Linden to the courthouse in Bay Minette, some 135 miles away. In my judgment, this was not only impractical but also unnecessary under the Rules.

AFFIDAVIT

/s/ Claud D. Neilson
Presiding Circuit Judge
for the Seventeenth Circuit
for the State of Alabama

Subscribed and sworn to before me this 9th day of October, 1985.

/s/ Jo Ann Bridges
Notary Public

My Commission Expires: January 16, 1987.

EXHIBIT A

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,
Plaintiff,

vs.

LAPEYROUSE GRAIN CORPORATION,
Defendant.

ORDER GRANTING MOTION FOR NEW TRIAL

After reviewing the briefs, evidence and oral arguments, the Court is of the opinion that the verdict obtained by the plaintiff against the defendant is not substantiated by the evidence and is excessive.

It is, therefore, ORDERED by the Court that the Motion for New Trial, as to the verdict for the plaintiff in the amount of $561,537.47, is set aside and reversed, and a new trial is granted unto the defendant.

The Court is further of the opinion that the verdict of the jury on the counterclaim should also be set aside and vacated. The Court finds that justice requires a retrial of all the issues in this cause.

It is ORDERED by the Court that the Motion for New Trial, as to the counterclaim of Lapeyrouse Grain Corporation, is granted, and the verdict is set aside and reversed.

All DONE and ORDERED this, the 5th day of November, 1984.

/s/ Claud D. Neilson
Circuit Judge

IN THE SUPREME COURT OF ALABAMA

CASE NO.: 84-424

Ex parte FLORA JANE NELSON, etc.,

Petitioners.

In re:

FLORA JANE NELSON, etc.,

Plaintiff,

v.

LAPEYROUSE GRAIN CORPORATION,

Defendants.

AFFIDAVIT

My name is Ruth Raines and I am the secretary for Judge Claud D. Neilson. I was Judge Neilson's secretary on November 5, 1984.

The Order attached hereto as Exhibit "A" was typed by me and was signed by Judge Neilson on November 5, 1984. On that same day, the Order was mailed to Eunice B. Blackmon, Clerk of the Circuit Court of Baldwin County, Alabama in Bay Minette and copies to Robert M. Alton, counsel for Nelson (plaintiff), and to Caine O'Rear, counsel for Lapeyrouse (defendant). I personally deposited these items in the mail on November 5, 1984.

AFFIDAVIT

/s/ Ruth Raines

Subscribed and sworn to before me
this 9th day of October, 1985.

/s/ Jo Ann Bridges
Notary Public

My Commission Expires: January 16, 1987

EXHIBIT A

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,
Plaintiff,

Vs.

LAPEYROUSE GRAIN CORPORATION,
Defendant.

ORDER GRANTING MOTION FOR NEW TRIAL

After reviewing the briefs, evidence and oral arguments, the Court is of the opinion that the verdict obtained by the plaintiff against the defendant is not substantiated by the evidence and is excessive.

It is, therefore, ORDERED by the Court that the Motion for New Trial, as to the verdict for the plaintiff in the amount of $561,537.47, is set aside and reversed, and a new trial is granted unto the defendant.

The Court is further of the opinion that the verdict of the jury on the counterclaim should also be set aside and vacated. The Court finds that justice requires a retrial of all the issues in this cause.

It is ORDERED by the Court that the Motion for New Trial, as to the counterclaim of Lapeyrouse Grain Corporation, is granted, and the verdict is set aside and reversed.

All DONE and ORDERED this, the 5th day of November, 1984.

/s/ Claud D. Neilson
Circuit Judge

IN THE SUPREME COURT OF ALABAMA

CASE NO.: 84-424

Ex parte FLORA JANE NELSON, etc.,

Petitioners.

In re:

FLORA JANE NELSON, etc.,

Plaintiff,

v.

LAPEYROUSE GRAIN CORPORATION,

Defendants.

AFFIDAVIT

My name is Kathryn E. Errington, and I am over the age of nineteen years. I am an attorney with law firm of Hand, Arendall, Bedsole, Greaves & Johnston located in Mobile, Alabama. I have personal knowledge of the facts contained in this affidavit.

I have worked on the case of *Nelson v. Lapeyrouse Grain Corporation* as an attorney for Lapeyrouse Grain Corporation, and personally participated in the drafting of Lapeyrouse Grain Corporation's post-trial motions.

On November 6th. 1984 my law firm received in the morning mail from the Office of Judge Claud D. Neilson the Order dated November 5, 1984 granting Lapeyrouse Grain Corporation's motion for a new trial. That Order is attached hereto as Exhibit "A". I personally reviewed the Order at approximately 10:00 a.m. on November 6th, 1985.

I have read the above and foregoing affidavit and I certify that the facts contained therein are true and correct.

/s/ Kathryn E. Errington

Sworn and subscribed to before me
this 9th day of October, 1985.

/s/ Janis M. Gilmore
Notary Public

My Commission Expires: 5/13/89

EXHIBIT A

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL CTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,
Plaintiff,

Vs.

LAPEYROUSE GRAIN CORPORATION,
Defendant.

ORDER GRANTING MOTION FOR NEW TRIAL

After reviewing the briefs, evidence and oral arguments, the Court is of the opinion that the verdict obtained by the plaintiff against the defendant is not substantiated by the evidence and is excessive.

It is, therefore, ORDERED by the Court that the Motion for New Trial, as to the verdict for the plaintiff in the amount of $561,537.47, is set aside and reversed, and a new trial is granted unto the defendant.

The Court is further of the opinion that the verdict of the jury on the counterclaim should also be set aside and vacated. The Court finds that justice requires a retrial of all the issues in this cause.

It is ORDERED by the Court that the Motion for New Trial, as to the counterclaim of Lapeyrouse Grain Corporation, is granted, and the verdict is set aside and reversed.

All DONE and ORDERED this, the 5th day of November, 1984.

/s/ Claud D. Neilson
Circuit Judge

IN THE SUPREME COURT OF ALABAMA

CASE NO.: 84-424

Ex parte FLORA JANE NELSON, etc.,

Petitioners,

In re: FLORA JANE NELSON, etc.,

Plaintiff,

v.

LAPEYROUSE GRAIN CORPORATION,

Defendants.

AFFIDAVIT

My name is Barbara M. Judge, and I am over the age of nineteen years. I am a Court Clerk, III for the Circuit Court of Baldwin County, Alabama. I have personal knowledge of the facts contained in this affidavit.

I am employed by the Register's office of the Circuit Court of Baldwin County, Alabama. The Register's office handles the equity docket., the domestic relations docket and all equity civil jury cases. The Circuit Clerk handles all civil, jury, traffic, juvenile, small claims and criminal dockets, as well as other dockets. Mrs. Eunice Tindal is the Register of the Circuit Court of Baldwin County, and Mrs. Eunice Blackmon is the Clerk of the Circuit Court of Baldwin County, Alabama.

The case of *Flora Nelson v. Lapeyrouse Grain Corporation,* Case No. CV-83-500016 is a case on the equity docket.

At times, pleadings and orders in cases on the equity docket are filed or sent to the Clerk's office, instead of to the Register's office. When this occurs, there is often

a delay in the reception of said pleadings and orders by the Register's office.

There are also times when equity pleadings and orders are received by the Clerk's office which stamps said pleadings "filed", and then sends them to the Register's office. This primarily happens with injunctions, restraining orders and some specific performance actions. Otherwise, if equity pleadings and orders are sent to the Clerk's office, there is generally a one or two day delay before the Register's office receives and files said documents.

I personally received and entered on the docket sheet Judge Neilson's Order dated November 5, 1984 (a copy of which is attached hereto as Exhibit "A") on November 8th, 1985.

I have read the above and foregoing affidavit and I certify that the facts contained therein are true and correct.

/s/ Barbara M. Judge

Sworn to and subscribed to before me
this 10th day of October, 1985.

/s/ Clara G. Smith
NOTARY PUBLIC
My Commission Expires: 9/6/87

EXHIBIT A

IN THE CIRCUIT COURT IN AND FOR
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiff,

vs.

LAPEYROUSE GRAIN CORPORATION,

Defendant.

ORDER GRANTING MOTION FOR NEW TRIAL

After reviewing the briefs, evidence and oral arguments, the Court is of the opinion that the verdict obtained by the plaintiff against the defendant is not substantiated by the evidence and is excessive.

It is, therefore, ORDERED by the Court that the Motion for New Trial, as to the verdict for the plaintiff in the amount of $561,537.47, is set aside and reversed, and a new trial is granted unto the defendant.

The Court is further of the opinion that the verdict of the jury on the counterclaim should also be set aside and vacated. The Court finds that justice requires a retrial of all the issues in this cause.

It is ORDERED by the Court that the Motion for New Trial, as to the counterclaim of Lapeyrouse Grain

Corporation, is granted, and the verdict is set aside and reversed.

All DONE and ORDERED this, the 5th day of November, 1984.

/s/ Claud D. Neilson
Circuit Judge

IN THE SUPREME COURT OF ALABAMA

CASE NO. 84-424

Ex Parte FLORA JANE NELSON, etc.,

Petitioner,

In Re: FLORA JANE NELSON, etc.,

Plaintiff,

v.

LAPEYROUSE GRAIN CORPORATION, et al.,

Defendants.

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Caine O'Rear III
Kathryn E. Errington
Hand, Arendall, Bedsole,
Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

Attorneys for Respondents
Lapeyrouse Grain Corporation
and Lapeyrouse Grain Corporation of Alabama

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF ALABAMA

CASE NO. 84-424

Ex Parte FLORA JANE NELSON, etc.,

Petitioner,

In re: FLORA JANE NELSON, etc.,

Plaintiff,

v.

LAPEYROUSE GRAIN CORPORATION, et al.,

Defendants.

APPLICATION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

ORAL ARGUMENT REQUESTED

APPLICATION FOR REHEARING

Come now respondents Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama and Honorable Claud D. Neilson, Circuit Judge, and hereby apply for rehearing with respect to the Petition for Writ of Mandamus and the Opinion granting same dated October 11, 1985 ("the New Opinion") for the following reasons:

1. This Court originally ruled in favor of Respondents by Opinion dated September 27, 1985 ("the Withdrawn Opinion"). Justice Adams authored the Withdrawn Opinion and seven Justices, including Justice Beatty, concurred. Justice Embry did not sit and Justice Houston had not yet begun official status. On September 30, 1985, the petition was placed on rehearing on the Court's own motion. On October 11, 1985, the first opinion was withdrawn and the Court reversed its previous decision.

However, neither Justice Adams (the author of the Withdrawn Opinion) nor Justice Beatty participated in the rehearing and the New Opinion.

Because of the errors contained in the New Opinion and the radical effect of the New Opinion on existing and established rules of civil and appellate procedure, this cause should be reheard before the entire Court.

2. The New Opinion erroneously imposes a requirement of "action by the clerk" within the time period prescribed under ARCP Rule 59.1. Rule 59.1 requires only rendition of a judgment or order under Rule 58(a).

3. Even assuming, *arguendo,* that Rule 59.1 requires entry of judgment under Rule 58(c), the execution by Judge Neilson on November 5, 1984 of a written order was a notation of an order sufficient to constitute "entry" under Rule 58(c).

4. The Supreme Court Advisory Committee on Civil Practice and Procedure has made it abundantly clear that the dispositive act under Rule 58 is action by the judge, not the clerk. (See Advisory Committee minutes attached hereto as Exhibit A.)

5. This Court obviously failed to consider Respondents' Supplemental Brief and Answer in Opposition to Petition for Writ of Mandamus which was filed on October 10, 1985, as well as the affidavits of Judge Claud D. Neilson, Ruth Raines, Kathryn E. Errington and Barbara M. Judge attached thereto. The New Opinion was released on Friday morning, October 11, 1985, and it must have been prepared and typed prior to that time. As evidenced by the timing and substance of the New Opinion,

the Court did not have the time or opportunity to properly consider the Supplemental Brief and affidavits.

6. This Court failed to consider previous decisions addressing the requirements of ARCP Rule 59.1, which decisions are contrary to the holding of the New Opinion in question. These decisions were not noted or addressed in the New Opinion in any manner.

7. This Court failed to consider the language of ARCP Rule 59(g), which defines the manner in which post-trial motions are removed from "pending" status. The New Opinion is contrary to the plain language of Rule 59(g) and that Rule obviously was not addressed or even considered by the Court.

8. The New Opinion failed to consider the language and effect of the other Rules—*e.g.*, ARCP Rules 50(b), 59(b) and 59(e) and ARAP Rule 4—in construing the requirements of Rule 59.1.

9. The New Opinion erroneously cited the *Holmes* and *Lacks* decisions as support for the Court's holding. The *Holmes* decision was cited completely out of context; the *Lacks* decision, if applicable at all, mandates a *denial,* not granting, of the writ. Additionally, the *Holmes* case is flawed in and of itself because of its improper reliance on a Maine decision. It appears that these two cases may have been erroneously summarized for the Court during the course of its internal decision-making processes.

10. The New Opinion erroneously states on page 2 that the November 5, 1984 order was "not filed *with* the Circuit clerk until November 8, 1984." In fact, the evidence set forth in the above-referenced affidavits indi-

cates that the order was probably delivered to the clerk on November 6, 1984. The order, therefore, was probably filed *with* the clerk on November 6th, but because of the clerk's delay in processing the order it was not stamped "filed" *by* the clerk until November 8th.

11. The New Opinion mistakenly reads a statement contained in Respondents' notice of cross-appeal as supporting its decision. On pages 2-3 of the New Opinion, the Court stated: "It is interesting that the notice of cross-appeal expressly recognizes, and correctly so, that Lapeyrouse appeals 'from the trial court's denial of said defendants' motion for judgment notwithstanding the verdict . . . which denial . . . occurred as a matter of law on November 6, 1984, pursuant to ARCP Rule 59.1.'"[1] This statement is contained in the notice because Judge Neilson did not *rule on* the j.n.o.v. motion in his order; therefore, Rule 59.1 applied. This Court, for some erroneous reason, apparently read the statement by Lapeyrouse as evidence of an admission regarding the necessity of an entry of judgment by the clerk.

12. The New Opinion, on page 4, erroneously relies on Rule 58(b). Rule 58(b) is inapplicable because the trial judge signed a written order on November 5, 1984 in compliance with Rule 58(a)(2) and Rule 59.1.

13. The New Opinion erroneously dismissed Lapeyrouse's cross-appeal. The Court apparently failed to read Nelson's notice of appeal which not only appealed from the order granting the motion for new trial but also from

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[1] Actually, November 6th was the ninetieth day and the time for *ruling* extended until midnight of that day.

the trial court's pre-trial order and all other orders and rulings of the trial court that were adverse to Nelson. Accordingly, Nelson's appeal was not entirely moot and "superfluous" as described on page 3 of the New Opinion. Therefore, Lapeyrouse's cross-appeal was timely filed.

14. By order dated February 21, 1985, this Court stayed all arguments and briefs on Nelson's motion to dismiss Lapeyrouse's cross-appeal. The New Opinion erroneously decided the cross-appeal issue without giving Lapeyrouse the opportunity to respond to the motion to dismiss.

15. The New Opinion construes Rule 59.1 in a manner diametrically opposed to the intent of the drafters of the Rule.

16. The New Opinion has already been widely criticized by the Circuit Judges of this state. It has been reported that the Circuit Judges of Alabama were uniformly alarmed at this decision as evidenced by their criticism of it at the Judicial Conference held in Tuscaloosa, Alabama on October 15-16, 1985.

17. The New Opinion erroneously authorizes clerks, not judges, to effectively decide the fate of all post-trial motions.

18. The New Opinion bends over backwards to penalize Circuit Judges who handle multi-county circuits or who specially hear cases outside their respective circuits.

19. The New Opinion discourages Circuit Judges from hearing any case away from their own respective clerks'

offices and from accepting appointments from this Court to specially hear cases.

20. The New Opinion is contrary to ARCP Rule 1(c) and ARAP Rule 1 regarding the assurance of "just" determinations of judicial proceedings in our state.

21. The New Opinion and the effect thereof violates Lapeyrouse's right to substantive and procedural due process and to equal protection of the laws under the Constitution of the United States.

22. There exist no rational policy reasons for construction of Rule 59.1 as reflected in the New Opinion.

23. The New Opinion and the effect thereof is totally unjust, unfair and inequitable.

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

* * *

6. *The Court Erroneously Stated that Lapeyrouse's Cross-Appeal Was Due to Be Dismissed.*

In the New Opinion, this Court held that Nelson's appeal was due to be dismissed and that the writ of mandamus was due to be issued. The Court further held that Lapeyrouse's cross-appeal from the order denying its motion for judgment notwithstanding the verdict was due to be dismissed because it was not filed within 42 days of Judge Neilson's order. The basis for this holding was that "the plaintiff's superfluous notice of appeal from the purported order granting the motion for new trial would not support an appeal" as the trial court's order was void. Finally, this Court held that Nelson's notice

of appeal, from a void order, did not operate to extend the time for filing the cross-appeal under ARAP Rule 4(a)(2), and thus Lapeyrouse's cross-appeal was not timely filed. However, this Court has failed to read the plaintiff's notice of appeal, a notice which supports an appeal, thereby rendering the filing of Lapeyrouse's cross-appeal both timely and in order.

First, Lapeyrouse would direct this Court to its order of February 25, 1985. The Court at that time stayed Nelson's motion to dismiss the cross-appeal until consideration of all the appeals on the merits. The New Opinion, however, effectively rules upon Nelson's motion to dismiss without giving Lapeyrouse any opportunity to be heard on the motion. Lapeyrouse now takes this opportunity to be heard and requests that this Court reverse its dismissal of the cross-appeal.

Nelson's notice of appeal provides that:

> Notice is hereby given that appellant/plaintiff Flora Jane Nelson, d/b/a W. J. Nelson Company, appeals to the Supreme Court of Alabama from the order of the trial court granting defendant's Motion for New Trial dated November 5th, 1984, and from the corrected order granting defendant's Motion for New Trial dated December 7th, 1984, which were entered in this cause and which set aside a jury's verdict rendered in favor of plaintiff in this case and which reversed or vacated the trial court's judgment dated July 30th, 1984 which was based upon the jury's verdict. *Appellant/plaintiff further gives notice of appeal from the trial court's pre-trial order and all other orders and rulings of the trial court that were adverse to appellant/plaintiff.* (emphasis added)

Furthermore, in her Complaint and Amended Complaint, Nelson claimed of Lapeyrouse the sum of $1,000,000 as com-

pensatory damages and the sum of $25,000,000 as punitive damages together with costs and interest. The jury's verdict of $561,537.47 is below the amount of damages sought by the plaintiff.

It is thus clear after reading Nelson's notice of appeal that the trial court's order granting Lapeyrouse's motion for new trial was not the only order appealed from, as Nelson also included as grounds for appeal the trial court's pre-trial order and all other orders and rulings of the trial court that were adverse to her. Thus, Lapeyrouse's cross-appeal, filed within 14 days after Nelson's notice of appeal, was timely filed under ARAP Rule 4(a)(2). For this Court to hold otherwise would clearly be at odds with the Alabama Rules of Appellate Procedure. This Court's opinion dismissing Lapeyrouse's Cross-Appeal is due to be reversed. Any other result would constitute a violation of Lapeyrouse's due process and equal protection rights.

The United States Supreme Court has held that if a full and fair trial on the merits as provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. *Lindsay v. Normet,* 405 U.S. 56 (1972). However, when an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Id.* at page 77. The appeal process which is created by a state must be exercised without discrimination. *Oppenheimer v. Roff,* 468 F.2d 901 (9th Cir. 1972). Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede

open and equal access to the courts. *Robinson v. Beto,* 426 F.2d 797 (5th Cir. 1970). A defendant's right of appeal must be free and unfettered. *Id.* at page 798.

In the instant case, if this Court's dismissal of Lapeyrouse's cross-appeal is upheld, such an action will surely result in discrimination to Lapeyrouse, in violation of the Equal Protection Clause, and will impede open and equal access to this Court. Lapeyrouse filed its cross-appeal within 14 days of Nelson's timely and valid notice of appeal. Nelson's appeal is not only from the trial court's order granting Lapeyrouse's motion for new trial, but is also from the Court's pre-trial order and all orders and rulings adverse to her. Her appeal is thus not grounded solely on a "void" order, but instead is based upon orders and rulings made during the trial of this cause. For this Court to dismiss Lapeyrouse's cross-appeal on the grounds that it was not filed within 42 days of November 6th, 1984, when in fact it was filed within 14 days after the plaintiff's notice of appeal, would constitute a violation of Lapeyrouse's rights under the Equal Protection and Due Process Clauses of our Constitution.

* * *

9. *The New Opinion Effectively Denies Lapeyrouse Due Process.*

The Court's opinion in the instant case, which holds that Judge Neilson's order granting Lapeyrouse's motion for new trial is a void order, deprives Lapeyrouse of its right to a judicially ordered new trial. This deprivation works a flagrant denial of both substantive and procedural due process.

It is well-settled that a state may not deny any person liberty or property without due process of law pursuant to the Fourteenth Amendment to the United States Constitution. To find a violation of procedural due process, it must appear that a state has failed to afford procedures adequate to protect person's rights from unreasonable or arbitrary deprivation. *International Association of Firefighters v. City of Sylacauga,* 436 F.Supp. 482 (N.D. Ala. 1977). To find a violation of substantive due process it must appear that a state has unreasonably or arbitrarily deprived a person of a right to which he is otherwise entitled. *Id.* at 489. Fundamental fairness is the test of due process. *Watson v. Patterson,* 358 F.2d 297 (10th Cir. 1966), *cert. denied,* 385 U.S. 876 (1966).

Both liberty and property are specifically protected by the Fourteenth Amendment from any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a state chooses to fasten upon its conduct or its statute. *Giaccio v. State of Pennsylvania,* 382 U.S. 399 (1966). Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against the government imposing burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. *Id.* at 403.

In *Sotto v. Wainwright,* 601 F.2d 184 (5th Cir. 1979), *reh'g. Denied,* 604 F.2d 671 (5th Cir. 1979), *cert. denied,* 445 U.S. 950 (1980), the petitioners filed a habeas corpus action asking the court to decide the constitutionality of

a Florida Rule of Criminal Procedure which governed the reduction of sentences by the state's trial courts. The petitioners had been convicted of a crime and were sentenced to three years in prison. *Id.* at 186. Pursuant to a Florida Rule of Criminal Procedure, the petitioners filed in the trial court a motion to mitigate their sentences. The rule itself specifically provided that the court had 60 days within which to rule on the motion. However, the trial court's determination of the petitioners' motion to reduce sentence came long after the expiration of the 60-day period. *Id.* at 187. After exhausting their state remedies, the petitioners brought a habeas corpus petition in the United States District Court alleging that the rule at issue, as applied, had worked an intolerable injustice upon the petitioners in the case, violated their rights to equal protection and counsel, and inflicted cruel and unusual punishment in denying them both procedural and substantive due process. *Id.* at 188. The United States Magistrate entered a report recommending that the district court afford petitioners relief, concluding that the petitioners had been denied fundamental due process. Determining it neither fair nor just that defendants fortunate enough to file their motions when the court is in a position to rule promptly will have their cases heard while those less fortunate will find the door of the court barred, the Magistrate urged the district court to allow the Florida trial court a reasonable time in which to enter its order upon the petitioners' motion for reduction of sentences. The district court approved the magistrate's report and directed the Florida trial court to enter its order upon petitioners' motion for reduction of sentence. *Id.* at 188.

Although the Fifth Circuit ultimately reversed the decision of the district court, the court did engage in a discussion of the substantive due process claims brought by the petitioners. In particular, the court noted that if strict construction of a statute's language would produce "an absurd, unjust or unintended result," or "merely an unreasonable one, at odds with the statute's purpose," the provision must be construed so as to avoid that result. The court then went on to note that the substantive content of the Due Process Clause, which goes beyond the specific provisions of the Bill of Rights, embodies a conception of fundamental justice. *Id.* at 190. It protects against state transgression those immunities that are implicit in the concept of ordered liberty, leaving a state free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in doing so it offends some principle of justice so rooted in the tradition and conscience of our people so as to be ranked as fundamental. *Id.* at 191, (citing *Snyder v. Massachusetts,* 291 U.S. 97 (1934). A state must advance a compelling justification to preserve a law or regulation that breaches any fundamental right. *Sotto,* 601 F.2d at 191.

In addition to substantive due process, the Fourteenth Amendment guards against violations of procedural due process. The term due process of law has been subject to varied interpretations and applications, but, at the very least, it implies a process of weighing and balancing the various interest of the state and individuals in judging whether a particular procedural scheme or process satisfies rudimentary principles of fairness. *Epps v. Cortese,* 326 F.Supp. 127 (E.D. Pa. 1971), vacated on other grounds, 407 U.S. 67 (1972). The basic purpose of the Due Process

Clause is to insure that governmental action which affects important interests of citizens shall be objectively rational and substantively just, insofar as possible in this imperfect and complicated world. *Lake Michigan College Federation of Teachers v. Lake Michigan Community College,* 390 F.Supp. 103 (W.D. Mich. 1974), *reversed on other grounds,* 518 F.2d 109 (9th Cir. 1975). In its procedural dimension, the Due Process Clause assumes that governmental decisions affecting the interests of citizens will more often than not be rational and just when made by suitably objective persons following orderly procedures. *Id.* at 127. This assumption rests on the faith that governmental officials will pursue a proper course of action if given a chance to do so. *Id.* Because the Due Process Clause applies to such a wide variety of activities and situations, the question of whether the government has provided due process depends upon the circumstances of each individual case. The resolution of the due process issue necessarily involves a careful analysis of the various governmental and private interests involved, and the making of the most elegant and sensitive accommodations in light of the basic purposes of the Due Process Clause. *Id.*

In *King v. Finch,* 428 F.2d 709 (5th Cir. 1970), the plaintiff appealed from a denial of disability benefits under the Social Security Act alleging that the application of amendments and law to pending cases was unconstitutional and that the application of said amendments to pending cases is the taking of property without due process in violation of the Fifth Amendment to the Constitution. Although the court refused to hold that the application of said amendments constituted a violation of due process, the court also refused to dispense with the possibility that

there might be a case in which the application of new standards or procedures to pending cases might interfere with the judicial power as it was created by the Constitution. *Id.* at page 713. It is clear, for example, that a sudden change in procedure may constitute a denial of due process. *Id.* It is also possible for a court to be so constituted that its ability to render justice is impaired to the extent that it violates due process by merely functioning under its procedures. *Id.*

Similarly, in *McNeill v. Butz,* 480 F.2d 314 (4th Cir. 1973), the plaintiffs sought their reinstatement in prior federal employment and to recover back pay. The plaintiffs alleged that their claim for relief was predicated upon the contention that the Department of Agriculture had violated plaintiffs' right to procedural due process in discharging them without permitting them the opportunity to confront and cross-examine their accusors. The Fourth Circuit first noted that procedural due process rights attached where state action condemns a person to suffer grievous loss of any kind. *Id.* at 318. Furthermore, procedural due process is a necessary concomitant of a democratic government's obligation to practice fairness. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action. *Id.* at 321.

The Fourth Circuit went on to state that while it did not dispute that the government has a substantial interest in the efficient and orderly discharge of unsatisfactory employees, this interest does not outweigh the employee's interest in having an effective opportunity to challenge

damning evidence and in preserving his job and reputation. Furthermore:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance and constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy governmental officials.

Id. at 323.

A state may place formal and procedural requisites on litigants without violating their constitutional rights to judicial process as long as the state's action is based upon a proper consideration of the nature of the proceedings and interests involved. *Caesar v. Mountanos,* 542 F.2d 1064 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977). Where fundamental rights are involved, regulations limiting these rights may be justified only by a compelling state interest, and legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. *Id.* at 1069. Thus, there is no doubt that if the state court in the application of local law deprives a person of some right without a hearing, the action of the state court may be set aside because it is wanting in due process. In such a case, the wrong is righted by the Supreme Court of the United States sitting in its appellate capacity. *Id.*

In the instant case, there can be little doubt but that this Court's New Opinion serves to deprive Lapeyrouse of both substantive and procedural due process in violation

of the Fourteenth Amendment to the Constitution of the United States. This Court's action in ordering the trial court to vacate its order granting Lapeyrouse's motion for new trial and to reinstate and reissue the judgment previously entered in this case constitutes an unreasonable and arbitrary deprivation of a right to which Lapeyrouse is otherwise entitled. After the trial of this cause, and the rendition and entry of the judgment in this case, Lapeyrouse promptly moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial. The trial court entertained briefs on Lapeyrouse's motions, and conducted a hearing on the motions to determine if they were warranted. After considering the evidence, and the briefs filed by the parties in this cause, as well as the arguments made therefrom, the trial court determined that the jury verdicts in favor of Nelson were not supported or substantiated by the great weight and preponderance of the evidence and therefore granted Lapeyrouse's motion for new trial.

The trial court granted this motion on November 5th, 1984, which was within the 90-day period prescribed by ARCP Rule 59.1. This order was immediately sent to the clerk of court, as well as to the counsel of record in the case. Nearly one year after the trial court granted this motion for new trial, this Court has unreasonably and arbitrarily applied a technicality in the rules (which has been previously discussed as an unwarranted and unmerited application) to deprive Lapeyrouse of its right to a new trial. This Court's construction of Rule 59.1 is unreasonable and flies in the face of the express mandate of Rule 1 of the ARCP and the cases decided thereunder. This Court's interpretation, construction and application

of Rule 59.1 are also in direct conflict with the express language of the rule, as well as the cases decided thereunder. This Court's actions in the instant case have resulted in the denial of property in that Lapeyrouse will undoubtedly now be forced to pay a judgment in excess of $560,000, a judgment based on a verdict which the judge in this cause, who heard all of the evidence presented, determined to be unreasonable and contrary to the evidence presented. This Court's unreasonable and arbitrary deprivation of Lapeyrouse's fundamental rights constitutes a violation of substantive due process.

This Court may attempt to advance the justification that it is free to regulate the procedure of its courts. While this state is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, in the New Opinion this Court has violated a principle of justice so rooted in the tradition of the United States as to be ranked as fundamental — the right to a fair trial. The trial court, which heard all of the evidence in this case, obviously did not believe that the previous trial in this case was a fair one, and hence granted Lapeyrouse a new trial.

The Court's reason for requiring that an order granting a motion for new trial be rendered and entered within the 90-day period is neither compelling nor rationally related to Rule 59.1's purpose. The purpose of Rule 59.1, as indicated in the Committee Comments, is to prevent motions from remaining pending for long periods of time before they are disposed of. Once a Court has ruled upon such a motion, it is no longer pending. This Court's extension of Rule 59.1 to require entry of a judgment by the

clerk within the 90-day period is neither compelling nor rationally related to the goals espoused in Rule 59.1 and the Comments thereunder. This Court has advanced no compelling justification for its change in procedure, a change which has deprived Lapeyrouse's fundamental right to a new and fair trial.

This Court's opinion also serves to deny Lapeyrouse procedural due process. It is clear that a sudden change in procedure may constitute a denial of due process. This Court's opinion constitutes just such a sudden change in procedure; Rule 59.1 does not stand for the proposition espoused in the New Opinion, the Committee Comments do not mandate the result contained in the New Opinion and the cases decided thereunder have never required an order granting a motion for new trial be entered by the clerk within the 90-day period. This Court's sudden change in procedure constitutes a violation of Lapeyrouse's right to procedural due process, and together with the deprivation of Lapeyrouse's right to substantive due process, requires a reversal of the opinion rendered in this case on rehearing.

D. *Conclusion and Request for Oral Argument*

It appears that the New Opinion dated October 11, 1985 was hastily drawn and not well thought out. It is simply inconceivable that this Court, upon proper consideration, could issue such a ruling totally at odds with the law and all concepts of justice. Prior to rendering the decision, the Court apparently did not have the benefit of Respondent's Supplemental Brief and the affidavits attached thereto. Nor did the Court have the benefit of this new brief and application. Two Justices who ruled in favor

of Respondents in the first opinion (including the author) did not participate in the second one.

This Court need only consult with its own Advisory Committee on the Rules to find out just how wrong the opinion is. That committee, as its chairman and the other members will readily attest, went to great lengths to carefully draft the rules so as to preclude the possibility of the very result reached by this Court in the New Opinion.

The Circuit Judges of this case have been alarmed by the absence of reasoning and forethought contained in the New Opinion. The New Opinion was criticized at the Judicial Conference by trial and appellate judges as just plain wrong.

Respondents plead with the Court to permit oral argument and rehearing of this cause before the Court *en banc*. To permit the New Opinion to stand as is would not only constitute a gross miscarriage of justice for Lapeyrouse but would also create an aberration not contemplated by the drafters or by the plain language of the rules.

Respondents respectively request the Court to rehear and reverse the New Opinion and to deny the petition for writ of mandamus.

/s/ Caine O'Rear III

/s/ Kathryn E. Errington
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that I have this 25th day of October, 1985, served a copy of this Answer and Brief on Roger S. Morrow, Esquire and Robert M. Alton, Jr., Esquire, counsel

for petitioners, by hand delivery, and on the Respondent Judge by mailing same by United States mail, properly addressed and first-class postage prepaid.

/s/ Caine O'Rear III

"EXHIBIT A"

"Minutes of Meeting
of Supreme Court of
Alabama Advisory
Committee on Civil
Practice and Procedure,"
of November 17, 1972.

Rule 58 Rendition and Entry of Judgments and Orders

Suggestions had been received concerning the propriety of making judgments effective at the time of their entry by the clerk rather than at the time of rendition by the Judge. It was noted that the Committee's intention in drafting the Rule in this manner was to insure that all persons would have knowledge of the entry of judgments, since the clerk was under a duty at the time of the entry of the judgment to submit notice to all parties. (See Rule 77(d). The suggestions, however, brought to the attention of the Committee a possible evil in the event judgment was rendered, but not entered by the clerk for some period of time thereafter due to fault or neglect of the clerk. The Committee, weighing the evils that might arise from postponing the effective date of the judgment to the time of entry, decided to modify the Rule so as to make judgments effective at the time of their rendition by the Court. A motion was made to achieve this result by amending Rule 58(c), second sentence by inserting the words "or separately maintained bench notes or" after the word "order" on line six of Rule 58(c) and inserting the words "or the

filing of a separate judgment or order'' after the word ''docket'' on the 6th line in Rule 58(c) and further deleting the words ''and the judgment or order is not effective before such entry'' where they appear at the end of the second sentence in Rule 58(c). The motion was seconded and carried, and Rule 58, as so amended, was adopted by the Committee.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-83-500016

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Plaintiff/Appellee,

vs.

LAPEYROUSE GRAIN CORPORATION
and LAPEYROUSE GRAIN CORPORATION
OF ALABAMA,

Defendants/Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF ALABAMA

(January 6, 1986)

Notice is hereby given that defendants/appellants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama appeal to the Supreme Court of Alabama from (i) the Order of the trial court dated and signed on December 12, 1985, and filed on December 16, 1985, which sets aside the previous order of the trial court dated November 5, 1984, granting defendants' motion for new trial; (ii) the denial of defendants' motion for new trial; (iii) the denial of defendants' motion for judgment notwithstanding the verdict; (iv) the jury verdict and judgment entered thereon against defendants in the amount of $561,537.47 on plaintiff's complaint; (v) the jury verdict and judgment entered thereon in favor of plaintiff on defendants' counterclaim; and (vi) all other orders, rulings and/or judgments of the trial court adverse to defendants.

This appeal is timely inasmuch as the filing of the trial court's Order on December 16, 1985 (which Order was rendered and entered pursuant to the mandate of the Supreme Court of Alabama dated December 10, 1985, in Case No. 84-424) constituted the first time a final appealable judgment had been entered in this case reinstating the jury verdicts and judgments entered thereon against defendants.

The Supreme Court of Alabama has jurisdiction inasmuch as the original judgment and amount in controversy exceeds $10,000.00.

Filed with this notice is a supersedeas bond which covers, among other things, the costs on appeal.

/s/ C. B. Arendall, Jr.
/s/ Alex F. Lankford
/s/ Caine O'Rear III

Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

Date Filed: _____
Certified as true copy:
_____
Register of Circuit Court

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

Designation of Clerk's/Register's Record

Appellants request the Clerk/Register to include the entire Clerk's/Register's record including, but not limited

to, docket sheets, minute entries, docket entries, pleadings, orders, motions, exhibits, judgments, verdict forms, written jury charges, the trial transcript previously prepared, and all other papers and case action summary sheets in this cause, but excluding all other items set forth in Rule 10(a), Alabama Rules of Appellate Procedure. Appellants also designate the entire transcript at the hearing which occurred in the above-referenced cause on February 5, 1983, which automatically became part of the record at trial pursuant to ARCP Rule 65 (a)(2).

Designation of Reporter's Transcript

Appellants request Lou Ann Rossi, Baldwin County Courthouse, Bay Minette, Alabama, to submit an original or certified copy of the entire reporter's record and transcript of the proceedings, evidence and trial of this case, including, but not being limited to, all testimony, all statements and rulings of the judge, all instructions and charges of the judge to the jury and all statements and arguments of counsel at trial. A portion, if not all, of this transcript has previously been prepared.

Appellants further request Carolyn Bolling Davis, Baldwin County Courthouse, Bay Minette, Alabama, to submit an original or certified copy of the entire reporter's record and transcript of the proceedings, evidence and testimony of the hearing which occurred in this case on February 5, 1983. This transcript has previously been prepared.

CERTIFICATE OF FILING

I certify that I have this date filed with the Register of the trial court the original and 5 copies of the fore-

going notice of appeal (along with the $100.00 docket fee), and such other instruments as have been completed herein, including a supersedeas bond, for service by the Register of a true copy on each of the following:

1. Clerk of the Supreme Court of Alabama, together with the $100 docket fee
   Honorable Robert G. Esdale
   Supreme Court Clerk
   Supreme Court of Alabama
   P. O. Box 157
   Judicial Building — 455 Dexter Avenue
   Montgomery, AL 36101

2. Lou Ann Rossi, Official Court Reporter
   Baldwin County Courthouse
   Bay Minette, Alabama

3. Carolyn Bolling Davis, Official Court Reporter
   Baldwin County Courthouse
   Bay Minette, Alabama

4. Robert M. Alton, Jr., Esquire
   Attorney at Law
   Suite 302 Corporate Square
   555 South Perry Street
   Montgomery, AL 36104

5. Roger S. Morrow, Esquire
   Whitesell, Morrow & Romline, P.C.
   Attorneys at Law
   P. O. Box 2450
   411 Washington Avenue
   Montgomery, AL 36103

Dated this 6th day of January, 1986.

/s/ C. B. Arendall, Jr.
/s/ Alex F. Lankford
/s/ Caine O'Rear III

Of Counsel:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

IN THE SUPREME COURT OF ALABAMA

CASE NO. 85-393

LAPEYROUSE GRAIN CORPORATION and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Appellants,

v.

FLORA JANE NELSON d/b/a W. J. NELSON COMPANY,

Appellee.

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

C. B. Arendall, Jr.
Alex F. Lankford, III
Caine O'Rear, III
Hand, Arendall, Bedsole, Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

Attorneys for Appellants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF ALABAMA

CASE NO. 85-393

LAPEYROUSE GRAIN CORPORATION and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Appellants,

v.

FLORA JANE NELSON d/b/a W. J. NELSON COMPANY,

Appellee.

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

ORAL ARGUMENT REQUESTED

APPLICATION FOR REHEARING

Come now appellants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively referred to as "Lapeyrouse") and hereby apply for rehearing with respect to this Court's order of January 28, 1986 dismissing Lapeyrouse's appeal in the above-referenced case. Under the facts and circumstances of this case, Lapeyrouse did not have an appeal on the merits until December 16, 1985, when Judge Neilson, pursuant to this Court's mandate, entered an order voiding his previous order granting Lapeyrouse a new trial and thereby reinstating a final judgment from which an appeal could be taken. If this Court's order of dismissal is allowed to stand, Lapeyrouse will be caused to suffer results which are manifestly unjust and inequitable, and will suffer a severe deprivation of its constitutional rights to due process and equal protection. This cannot be countenanced given the facts and history of this case.

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

* * *

C. *Argument*

The law in Alabama is clear that an appeal does not lie unless it is from a final judgment or order. As there was no final judgment or order in this cause until Judge Neilson voided his order of November 5, 1984, thereby reinstating the previously vacated judgment, there was no final order or judgment from which Lapeyrouse could have perfected an appeal. Lapeyrouse's Notice of Appeal of January 6, 1986 was filed well within forty-two (42) days of December 16, 1985 (the filing date of Judge Neilson's December 12th order), and, as such, Lapeyrouse's appeal is not due to be dismissed and should be reinstated on this Court's docket. If Lapeyrouse's appeal is not reinstated, Lapeyrouse will suffer not only harsh and inequitable results, but also a severe deprivation of its constitutional rights to due process and equal protection of the law.

* * *

The United States Supreme Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review. *Lindsey v. Normet,* 405 U.S. 56 (1972). However, when an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Id.* at 77. The appeal process which is created by a state must be exercised without discrimination. *Oppenheimer v. Roff,* 468 F.2d 901 (9th Cir. 1972). Due process requires that a state, once it establishes avenues of appellate review, must keep those

avenues free of unreasoned distinctions that impede open and equal access to the courts. *Williams v. Oklahoma City,* 395 U.S. 458, 459 (1969); *Robinson v. Beto,* 426 F.2d 797 (5th Cir. 1970). A defendant's right of appeal must be free and unfettered. 426 F.2d at 798.

Applying this well-tested jurisprudence to the facts of the instant case, it is clear that Lapeyrouse's appeal of January 6, 1986 was timely and that a dismissal of the appeal would violate Lapeyrouse's constitutional rights of due process and equal protection. Until December 16, 1985, when the Register of the Circuit Court of Baldwin County filed Judge Neilson's December 12, 1985 order voiding his previous order granting Lapeyrouse's motion for new trial, there was no final judgment or order from which Lapeyrouse could take an appeal. Once this final judgment was entered on the docket, Lapeyrouse had an appeal of right from the merits of this cause, and it took an appeal in compliance with the requirements of ARAP 4. As such, Lapeyrouse's appeal was timely and must be reinstated on this Court's docket.

After examining the applicable law of Alabama and the facts of this case, it is clear that Lapeyrouse is entitled to proceed with its appeal, that this Court's order dismissing Lapeyrouse's appeal is due to be reconsidered and withdrawn, and that Lapeyrouse's appeal is due to be reinstated on this Court's docket. Lapeyrouse filed a timely appeal in this cause from the only order or judgment which was appealable—*i.e.,* Judge Neilson's order of December 12, 1985 declaring void and setting aside his previous order of November 5, 1984. When Judge Neilson granted Lapeyrouse's motion for new trial on November

5, 1984, setting aside and vacating the jury verdict and the judgment entered thereon, there was no underlying judgment from which Lapeyrouse could have taken an appeal. The underlying judgment was not restored on the docket until December 16, 1985; hence, the underlying judgment in favor of Nelson was not final, nor appealable, until December 16, 1985. It is further clear that had Lapeyrouse attempted to take an appeal from the jury verdict and judgment entered thereon prior to December 16, 1985, such an appeal would have been dismissed in that it would not have been an appeal from a final judgment or order.

It should be noted that Nelson also operated under the assumption that until the writ of mandamus was granted there was no underlying final judgment. On October 11, 1985 (the date of this Court's opinion granting Nelson's writ of mandamus), Nelson had certified and caused to be recorded, for the first time, the judgment of July 31, 1984. [sic]. When apprised of the fact that the mandate on said writ had not yet been issued, Nelson prepared and filed an affidavit with the Baldwin and Mobile County Probate Courts indicating that she had inadvertently caused the judgment of July 31, 1984 to be certified on October 11, 1985 by the clerk, and recorded among the land records of both Baldwin and Mobile Counties. (See Affivadit of Flora Nelson, attached hereto as Exhibit 16.) She further testified under oath that she did not claim any right, title or interest in the property of Lapeyrouse Grain or any other defendant by virtue of the inadvertent filing of this judgment on October 11, 1985. Therefore, despite her bare contentions that Lapeyrouse's appeal from the July 31, 1984 judgment came too late, Nelson too operated

under the assumption that there was no final judgment in this cause until this Court granted the relief sought in her petition for writ of mandamus and issued the mandate thereon.

Finally, to dismiss Lapeyrouse's appeal would violate both the precepts of ARAP 1 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Lapeyrouse's appeal of January 6, 1986 was a timely appeal from a final judgment, an appeal of right given by § 12-22-2 of the *Code of Alabama* (1975). Any attempt to deprive Lapeyrouse of this statutorily-given right to appeal would be unconstitutional and improper.

D. *Conclusion and Request for Oral Argument*

Lapeyrouse seeks to impress upon this Court that its appeal of January 6, 1986 was a timely filed appeal. Alabama law is clear to the effect that a party may take an appeal only from a final judgment or order, and Lapeyrouse would show unto this Court that there was no final judgment or order from which to take an appeal in this case until December 16, 1985, when Judge Neilson's order setting aside his previous November 5, 1984 order was filed by the Register of the Circuit Court of Baldwin County, Alabama. Until December 16, 1985, there was simply no final judgment or order from which Lapeyrouse could have taken an appeal, and thus its filing of an appeal on January 6, 1986, was timely.

Lapeyrouse respectfully requests this Court to permit oral argument and rehearing of this cause before the Court *en banc*. The rights and issues involved in this cause are of constitutional dimension and require that

Lapeyrouse be afforded the opportunity to fully present its arguments before this Court in order to present Lapeyrouse with an opportunity to be heard. Lapeyrouse respectfully requests this Court to order oral argument, to rehear and withdraw its order of January 28, 1986 dismissing Lapeyrouse's appeal and to reinstate Lapeyrouse's appeal on the docket.

/s/ C. B. Arendall, Jr.
/s/ Alex F. Lankford, III
/s/ Caine O'Rear, III

Attorneys for Appellants

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10th day of February, 1986, served a copy of this Application for Rehearing and Brief in Support Thereof on Roger S. Morrow, Esquire and Robert M. Alton, Jr., Esquire, counsel for appellee, by hand delivery.

/s/ CAINE O'REAR, III

Rule 2.

One form of action.

There shall be one form of action to be known as "civil action."

Rule 58.

Rendition and entry of judgments and orders.

(a) *Rendition of judgments and orders.* A judge may render his order or judgment: (1) by notation thereof upon his bench notes without any other or further written documents, or (2) by executing a separate written document, or (3) by including the order or judgment in his opinion or memorandum, or (4) by simply appending to his opinion or memorandum or including therein his direction as to the order or judgment sought to be entered.

(b) *Sufficiency of judgment, order, or minute entry thereof.* A judgment or order, or the minute entry thereof, need not be phrased in formal language nor bear particular words of adjudication. The judgment or order, or the minute entry thereof, will be sufficient if it is signed or initialed by the judge and indicates an intention to adjudicate, considering the whole record, and if it indicates the substance of the adjudication.

(c) *Entry of judgment or order.* Upon rendition of a judgment or order as provided in subdivision (a) of this rule, unless it contains a specific direction otherwise or is subject to the provisions of Rule 54(b), the clerk shall note such judgment or order forthwith in the civil docket if separately maintained. Notation of a judgment or order on separately maintained bench notes or in the civil docket or the filing of a separate judgment or order constitutes the entry of the judgment or order. The entry of the judgment or order shall not be delayed for the taxing of costs.

Rule 59.

New trials; amendments of judgments.

(g) *Presentation of motions not required.* Presentation of any post-trial motion to a judge is not required in order to perfect its making, nor is it required that an order continuing any such motions to a date certain be entered. All such motions remain pending until ruled upon by the court (subject to the provisions of Rule 59.1), but shall not be ruled upon until the parties have had opportunity to be heard thereon.

Rule 4.

Appeal as of right — When taken.

(a) *Appeals generally.*

(1) Except as otherwise provided herein, in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 42 days (six weeks) of the date of the entry of the judgment or order appealed from. In appeals from the following orders or judgments, such notice of appeal shall be filed within 14 days (two weeks) of the date of the entry of the order or judgment appealed from: (A) any interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or modify an injunction; (B) any interlocutory order appointing or refusing to appoint a receiver; (C) any interlocutory order determining the right to public office; and (D) any judgment in an action for the validation of public obligations, including any actions wherein a judgment is entered with respect to the validity of obligations of the state of Alabama or any agency or instrumentality thereof. A pre-trial appeal by the state shall be taken within the time allowed by the rule of criminal procedure providing for such an appeal. On an appeal from a judgment or order a party shall be entitled to a review of any judgment, order, or ruling of the trial court.

(2) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days (two weeks) of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(3) The filing of a post-judgment motion pursuant to Rules 50, 52, 55, or 59 of the Alabama Rules of Civil Procedure (ARCP) shall suspend the running of the time for filing a notice of appeal. In cases where post-judgment motions are filed, the full time fixed for filing a notice of appeal shall be computed from the date of the entry in the civil docket of an order granting or denying such motion. If such post-judgment motion is deemed denied under the provisions of Rule 59.1 of the Alabama Rules of Civil Procedure, then the time for filing a notice of appeal shall be computed from the date of denial of such motion by operation of law, as provided for in Rule 59.1. Any error or ground of reversal or modification of a judgment or order which was asserted in the trial court may be asserted on appeal without regard to whether such error or ground has been raised by motion in the trial court under Rule 52(b) or Rule 59 of the ARCP.

No. 85-1414

Supreme Court, U.S.
FILED
MAR 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

LAPEYROUSE GRAIN CORPORATION and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Petitioners,

vs.

FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction in this case due to the fact Petitioners have failed to exhaust their remedies in the Supreme Court of Alabama and due to the fact the Supreme Court of Alabama has entered an order reinstating Petitioners' appeal?

2. Whether the Supreme Court of Alabama's dismissal of an appeal filed by Petitioners, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, constitutes a denial of due process of law and equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution when the appeal was dismissed pursuant to the Alabama Rules of Appellate Procedure more than forty-two (42) days after denial by operation of law of Petitioners' post-trial motions?

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No. 85-1414

In The

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October Term, 1985

LAPEYROUSE GRAIN CORPORATION and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Petitioners,

vs.

FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari to review the decision, judgments and orders of the Supreme Court of Alabama filed on October 11, 1985, November 22, 1985, and December 10, 1985.

OPINIONS BELOW

The petition for writ of certiorari filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively referred to as Lapey-

rouse) is not complete in its citations of the opinions and judgments issued by the Supreme Court of Alabama. In addition to the opinions and judgments cited by Petitioners, the Supreme Court of Alabama entered an order on February 28, 1986, in Case No. 84-342. A copy of that order is reproduced in the Appendix, *infra,* at B-34. The order of the Supreme Court of Alabama issued on February 28, 1986, reinstated an appeal filed by Lapeyrouse which is the appeal that Lapeyrouse is claiming denied them due process of law and equal protection of the law. The order of February 28, 1986, has not been reported as of this date. On March 6, 1986, the Supreme Court of Alabama also issued two additional orders which have not been reported but which are reproduced in the Appendix, *infra,* at B-36, 38). The two orders of the Supreme Court of Alabama dated March 6, 1986, clarified the court's earlier order of February 28, 1986, which reinstated Lapeyrouse's appeal in Case No. 84-342.

Petitioners refer to an order issued by the Supreme Court of Alabama on January 28, 1986, which dismissed their appeal in Case No. 85-393. Since the filing of the petition for writ of certiorari, the Supreme Court of Alabama has entered an additional order on February 28, 1986, which denied Lapeyrouse's application for rehearing in Case No. 85-393. A copy of the denial of the application for rehearing issued by the Supreme Court of Alabama on February 28, 1986, is reproduced in the Appendix, *infra,* at B-33.

———o———

STATEMENT OF JURISDICTION

This Honorable Court does not have jurisdiction in this case. Lapeyrouse contends in its statement of jurisdiction that jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3). Flora Jane Nelson (hereinafter referred to as Nelson) asserts that 28 U.S.C. § 1257 prohibits jurisdiction in this case. The reason that jurisdiction is objected to by Nelson is that 28 U.S.C. § 1257 requires a final judgment to be rendered by the highest court of the state before jurisdiction is conferred. Jurisdiction is not conferred on this Court in this case because a final judgment as contemplated by § 1257 has not been entered herein and Lapeyrouse has not exhausted its remedies or appeals in the courts of the State of Alabama.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Lapeyrouse in its petition for writ of certiorari, the following constitutional and statutory provisions are also involved in this case:

1. 28 U.S.C. § 1257 provides in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

2. Rule 58 of the Alabama Rules of Civil Procedure provides in pertinent part as follows:

"Rule 58.

Rendition and entry of judgments and orders.

(a) *Rendition of judgments and orders.* A judge may render his order or judgment: (1) by notation thereof upon his bench notes without any other or further written document, or (2) by execution a separate written document, or (3) by including the order of judgment in his opinion or memorandum, or (4) by simply appending to his opinion or memorandum or including therein his direction as to the order or judgment sought to be entered.

(b) *Sufficiency of judgment, order or minute entry thereof.* A judgment or order, or the minute entry thereof, need not be phrased in formal language nor bear particular words of adjudication. The judgment or order or the minute entry thereof will be sufficient if it is signed or initialed by the judge and indicates an intention to adjudicate, considering the whole record, and if it indicates the substance of the adjudication.

(c) *Entry of judgment or order.* Upon rendition of a judgment or order as provided in subdivision (a) of this rule, unless it contains a specific direction otherwise or is subject to the provisions of Rule 54(b), the clerk shall note

> such judgment or order forthwith in the civil docket if separately maintained. Notation of a judgment or order on separately maintained bench notes or in the civil docket or the filing of a separate judgment or order constitutes the entry of the judgment or order. The entry of the judgment or order shall not be delayed for the taxing of costs."
>
> * * *

STATEMENT OF THE CASE[1]

The statement of the case set forth by Petitioners, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter referred to collectively as Lapeyrouse), in this case is incomplete, misleading, and incorrect in many regards. For this reason and for compliance with the rules of this Court, Respondent, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company (hereinafter referred to as Nelson), will set forth the following statement of the case.

This action was commenced on or about the 27th day of January, 1983, by the filing of a complaint by Flora Jane Nelson, individually and doing business as W. J. Nelson Company, against the Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama and various fictitious parties. In Nelson's complaint, Nelson sought damages against Lapeyrouse for, *inter alia,* breach

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[1]References to Appendix "A" are to the appendix contained in the Petition for Writ of Certiorari to the Supreme Court of Alabama filed by the Petitioners herein. References to Appendix "B" are to the appendix to Respondent's Brief in Opposition.

of fiduciary duty, and Nelson sought an accounting of certain disputed items concerning a running account between merchants. (A-29) Subsequent to the filing of the original complaint, Nelson amended her complaint to add additional counts setting forth, *inter alia,* a cause of action against Lapeyrouse for conversion. (B-1)

On or about July 26, 1984, this case came to trial in the Circuit Court of Baldwin County, Alabama. The case was tried by a jury and on July 30, 1984, the jury returned a verdict in favor of the Plaintiff and against the Defendants on Plaintiff's claims and assessed Plaintiff's damages at $561,537.47. The jury also found in favor of Nelson against Lapeyrouse on Lapeyrouse's counterclaim. Judgment was entered on the verdict on August 9, 1984. (A-8; A-23) On August 8, 1984, Lapeyrouse filed post-trial motions for judgment notwithstanding the verdict and motion for new trial. (A-8; A-23) Rule 59.1 of the Alabama Rules of Civil Procedure requires that a motion for new trial must not remain pending for more than ninety days and, thus, it is denied by operation of law at the expiration of the ninetieth day. (See page 3 of Petition) The trial court did not file or enter an order on Lapeyrouse's post-trial motions by November 6, 1984, which was the ninetieth day after the filing of Lapeyrouse's post-trial motions. (A-26; A-52) The trial court did draft and sign an order granting a motion for new trial which was dated November 5, 1984, but this motion was not filed with the Circuit Clerk of Baldwin County, Alabama, until November 8, 1984. (A-26; Affidavit of Barbara M. Judge, B-4)

Rule 4 (a) (3) of the Alabama Rules of Appellate Procedure provides that a party has forty-two (42) days from the date of the entry of the judgment or order appealed

from within which to file a notice of appeal with the clerk of the trial court. (A-106) The effective date for purposes of computing time under the Alabama Rules of Civil and Appellate Procedure is the date the order is filed. (A-10; A-104; A-106) Under Rule 4 (a) (3) of the Alabama Rules of Appellate Procedure, the filing of a post-judgment motion for judgment notwithstanding the verdict and new trial suspends the running of the time for filing a notice of appeal until the date of the entry of an order granting or denying the post-judgment motion or until the operation of Rule 59.1 of the Alabama Rules of Civil Procedure. (A-106; Page 3 of petition)

On December 13, 1984, Nelson filed a precautionary notice of appeal to the Supreme Court of Alabama from the void order of the trial court which attempted to grant Lapeyrouse's motion for new trial after the expiration of the ninety day period provided for in Rule 59.1 of the Alabama Rules of Civil Procedure. (A-52) On December 26, 1984, Lapeyrouse filed a notice of cross-appeal to the Supreme Court of Alabama from the trial court's denial of Lapeyrouse's motion for judgment notwithstanding the verdict with respect to Nelson's complaint and with re-respect to the counterclaim, specifically stating that those denials occurred as a matter of law on November 6, 1984, due to the operation of Rule 59.1 of the Alabama Rules of Civil Procedure. (A-54) The order of the trial court filed on November 8, 1984, was void in that the trial court lost jurisdiction to grant a new trial and consequently, Plaintiff's notice of appeal filed on December 13, 1984, and Defendants' notice of appeal filed on December 26, 1984, were nullities and void. (A-8) Plaintiff's notice of appeal was clearly an appeal from the grant of a new trial pursuant

to Section 12-22-10, *Code of Alabama, 1975,* and Plaintiff did not need or desire an appeal if the order granting new trial was void. (B-6) Neither Plaintiff *nor Defendants* filed an appeal from the judgment of $561,537.47; thus both notices of appeal were also nullities.

Nelson filed on January 28, 1985, a Petition for Writ of Mandamus with the Supreme Court of Alabama requesting the Court to issue a Writ of Mandamus commanding the trial court to vacate the void order granting Lapeyrouse's motion for new trial, and to further order that the judgment in favor of Nelson be reinstated. (B-7) Nelson also requested that her Petition for Writ of Mandamus as well as her purported appeal and the purported cross-appeal of Lapeyrouse be consolidated. (B-20) Nelson also filed a motion to dismiss Lapeyrouse's cross-appeal as untimely. (B-23) The motion to dismiss was filed due to the fact that Defendants' notice for cross-appeal was filed more than forty-two (42) days after the automatic denial on November 6, 1984, of Defendants' post-trial motions, and was thus untimely. (A-54; A-106)

On September 27, 1985, the Supreme Court of Alabama rendered an opinion denying Nelson's Petition for Writ of Mandamus. (A-1) On September 30, 1985, the Supreme Court of Alabama ordered *ex mero motu* that the Petition for Writ of Mandamus be placed on rehearing. (B-26) On October 11, 1985, the Supreme Court of Alabama granted Nelson's Petition for Writ of Mandamus and dismissed the superfluous appeal of Nelson in Case No. 84-294, *Nelson v. Lapeyrouse Grain Corporation,* and dismissed the cross-appeal of Lapeyrouse in Case No. 84-342, *Lapeyrouse Grain Corporation v. Nelson.* (A-8; A-12; A-15; A-16; A-17)

The substance of the opinion and order of the Supreme Court of Alabama was to the effect that a notice of appeal from a void order granting a new trial will not support an appeal and, thus, does not operate to extend the time for filing a cross-appeal under Rule 4 (a) (2) of the Alabama Rules of Appellate Procedure; therefore, Lapeyrouse's appeal was not timely filed. On application for rehearing filed by Lapeyrouse on or about October 25, 1985, Lapeyrouse raised for the first time any issues regarding an alleged deprivation of its constitutional rights. (A-69) The Supreme Court of Alabama overruled Lapeyrouse's application for rehearing on November 22, 1985. (A-12)

On December 10, 1985, the Supreme Court of Alabama entered an order setting aside the void order of the trial court purporting to grant new trial to Lapeyrouse. (A-17) On this same date the Supreme Court of Alabama issued two certificates of judgment which dismissed the appeal of Nelson and the cross-appeal of Lapeyrouse. (A-15, A-16) By order entered on December 16, 1985 (dated December 12, 1985), the trial judge set aside his void order filed November 8, 1984. (A-28)

On January 6, 1986, Lapeyrouse filed a notice of appeal to the Supreme Court of Alabama from the order of the trial judge complying with the Writ of Mandamus issued by the Alabama Supreme Court. (A-91) On January 17, 1986, Nelson filed with the Supreme Court of Alabama a motion to dismiss the appeal of Lapeyrouse. (B-27) On January 28, 1986, the Supreme Court of Alabama dismissed the appeal of Lapeyrouse taken from the order of the trial judge complying with the Writ of Mandamus issued by the Supreme Court of Alabama. (A-19)

The application for rehearing filed by Lapeyrouse was overruled on February 28, 1986. (B-33)

On February 28, 1986, the Supreme Court of Alabama also ordered, *ex mero motu,* that the cross-appeal of Lapeyrouse in Case No. 84-342 be reinstated. (B-34) On March 6, 1986, the Supreme Court of Alabama ordered that the appeal of Nelson in Case No. 84-294, also be reinstated. (B-36) On March 6, 1986, the Supreme Court of Alabama entered a second order clarifying its prior orders stating that its prior orders issuing the Writ of Mandamus in Case No. 84-424, were unaffected by the Court's orders reinstating the appeals in Case Nos. 84-294 and 84-342. The reinstated appeals in Case Nos. 84-294 and 84-342 are currently pending before the Supreme Court of Alabama. On March 13, 1986, Respondent filed an application for rehearing concerning the reinstatement of Lapeyrouse's appeal and a motion to dismiss the appeal of Lapeyrouse. (B-41, 46) As of the date of the completion of this brief the Supreme Court of Alabama has not ruled on these motions.

In a corollary but related proceeding, Lapeyrouse filed on December 11, 1985, an independent action pursuant to Rule 60(b) of the Alabama Rules of Civil Procedure for relief from the judgment in the Circuit Court of Baldwin County, Alabama. This action was filed as a result of the Supreme Court of Alabama's issuance of the Writ of Mandamus in Case No. 84-424 and as a result of the dismissal of Lapeyrouse's appeal in Case No. 84-342. The Circuit Court of Baldwin County (Judge Norton) dismissed the Rule 60(b) action on January 3, 1986. (B-51) Lapeyrouse filed a notice of appeal from that order of dismissal and that appeal is currently pending before the Supreme Court of Alabama as Case No. 85-471. (B-56, 57)

Due to the pendency of the three appeals in the Supreme Court of Alabama it is obvious that Petitioners have not exhausted their remedies in the Courts of Alabama and the Petition for Writ of Certiorari should be summarily denied. This is certainly true since the Supreme Court of Alabama is reconsidering the dismissal of Lapeyrouse's appeal in Case No. 84-342, the dismissal of which is the source of Lapeyrouse's complaint of a purported denial of equal protection of law and due process of law.

———o———

SUMMARY OF THE ARGUMENT WHY THE WRIT SHOULD BE DENIED

Lapeyrouse's petition for writ of certiorari to the Supreme Court of Alabama should be denied for the following reasons:

1. The Court does not have jurisdiction in this case due to the fact that Lapeyrouse has not exhausted its remedies in the Supreme Court of Alabama and the Supreme Court of Alabama has not yet entered a final judgment as contemplated by 28 U.S.C. § 1257.

2. The decision of the Alabama Supreme Court did not deny Lapeyrouse due process of law or equal protection of law.

It is absolutely clear in this case that the Supreme Court of the United States does not have jurisdiction in this case due to the fact that Lapeyrouse has not exhausted its remedies in the state courts of Alabama. On February 28, 1986, the Supreme Court of Alabama entered an order

reinstating Lapeyrouse's appeal, the dismissal of which was the basis of Lapeyrouse's claim of denial of due process of law and equal protection under the law. (B-34) On March 13, 1986, Nelson filed an application for rehearing concerning the reinstatement of Lapeyrouse's appeal and also a motion to dismiss Lapeyrouse's appeal. Respondent Nelson is claiming that the Supreme Court of Alabama had previously issued a final judgment and that the Supreme Court of Alabama did not have jurisdiction to reinstate Lapeyrouse's appeal; however, the Supreme Court of Alabama has not yet ruled in favor of Respondent Nelson and has not yet decided that issue.

Thus, as of the date of the filing of Respondent's brief, the Supreme Court of Alabama has not finally dismissed Lapeyrouse's appeal; therefore a final judgment has not been entered by the Supreme Court of Alabama upon which 28 U.S.C. § 1257 would confer jurisdiction upon this court. It is absolutely clear due to the posture of the case before the Supreme Court of Alabama that the judgment of dismissal entered by the Alabama Supreme Court on December 10, 1985, is not final in the sense that no further proceedings can possibly take place in the State judicial system, nor can it be stated that the proceedings before the Alabama Supreme Court be characterized as certain, nor can it be stated that the proceedings will not have a significant effect on the constitutional issues of due process of law and equal protection of law raised by Lapeyrouse in their petition for writ of certiorari. *See, Minnick v. California Department of Corrections,* 452 U.S. 105 (1980); *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975).

Notwithstanding that this Court does not have jurisdiction to grant certiorari in this case, Lapeyrouse's petition for writ of certiorari should be denied because it is absolutely evident that Petitioners have not been denied due process of law or equal protection of the law. The Supreme Court of Alabama dismissed Lapeyrouse's appeal because the court did not have jurisdiction due to the fact the Lapeyrouse's notice of appeal was filed more than forty-two (42) days after the automatic denial of Lapeyrouse's post-trial motions on November 6, 1984. Under Rule 4 of the Alabama Rules of Civil Procedure, an appeal must be filed within forty-two (42) days in order to invoke the jurisdiction of the Supreme Court of Alabama. The dismissal of Lapeyrouse's appeal involved questions that were totally interrelated with the Alabama Rules of Civil Procedure which are peculiar to the State of Alabama, the constitutionality of which were not at issue in this case and do not warrant an exercise of certiorari jurisdiction of this Court. *See, Duncan v. Tennessee,* 405 U.S. 127 (1972). This is simply a case where Lapeyrouse failed to timely file an appeal pursuant to state law and their appeal was dismissed. Such a dismissal does not constitute a denial of due process of law or equal protection of the law and the petition for writ of certiorari should be denied.

———o———

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI

A. The Court Does Not Have Jurisdiction in This Case Due to the Fact That Lapeyrouse Has Not Exhausted Its Remedies in the Supreme Court of Alabama and due to the fact the Supreme Court of Alabama Has Not Yet Entered Final Judgment as Provided For in 28 U.S.C. § 1257.

28 U.S.C. § 1257 states in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . ."

In this case due to the pendency of various proceedings before the Supreme Court of Alabama, a final judgment as contemplated in 28 U.S.C. § 1257 has not been rendered by the Supreme Court of Alabama. This is proven by the fact that the Supreme Court of Alabama entered an order reinstating Lapeyrouse's appeal in Case No. 84-342. (B-34)

Subsequent to the entry of the order of the Supreme Court of Alabama reinstating Lapeyrouse's appeal in Case No. 84-342, Nelson has filed an application for rehearing and a motion to dismiss Lapeyrouse's appeal in Case No. 84-342. (B-41, 46) In both the motion to dismiss and the application for rehearing, Nelson is contending that the Supreme Court of Alabama's certificate of judgment entered on December 10, 1985, dismissing Lapeyrouse's appeal in Case No. 84-342 is a final judgment and that the Supreme Court of Alabama does not have the authority or jurisdiction to reinstate that appeal. (B-41, 46) The motion and application for rehearing have been briefed by Nelson, but the Supreme Court of Alabama has not ruled on

these matters, and as of the date of this brief, Lapeyrouse's appeal concerning the judgment entered in favor of Nelson for $561,437.47 on July 30, 1984, is currently pending before the Supreme Court of Alabama. This being the case, Lapeyrouse has not exhausted its remedies in the courts of the State of Alabama and a final judgment as contemplated by 28 U.S.C. § 1257 and as interpreted by the United States Supreme Court has not been entered in this case. This being true, this Court does not have jurisdiction of this matter and the petition for writ of certiorari should be denied.

The finality requirement limiting the jurisdiction of the United States Supreme Court to review a State court judgment serves several ends which are as follows:

1. It avoids piecemeal review of State court decisions;

2. It avoids giving advisory opinions in cases where there may be no real case of controversy in the sense of Article III; and

3. It limits review of State court determinations of federal constitutional issues to leave at a minimum intrusion in State affairs. U.S.C.A. Article III, § 1, et seq.; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

The requirements by Congress that review of state court judgments be final was succinctly stated in the case of *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), as follows:

> ". . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of

> delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. . . ." 326 U.S. at 124.

It is axiomatic that a party must have exhausted his remedies before the State appellate courts before the United States Supreme Court will review a decision of the highest court of that particular State. To invoke the jurisdiction of this Court, the outcome of further proceedings of the State court have to be characterized as certain or that further proceedings in the State court will not have a significant effect on the federal constitutional issues presented by certiorari petition. *Minnick v. California Department of Correction,* supra. In some rare cases, a state court's decision of a federal issue can be treated as a final judgment even though additional proceedings in a State court are anticipated. *Cox Broadcasting Corporation v. Cohn,* supra; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* supra. In order to meet one of these exceptions, however, it has to be evident that further proceedings in the State court will not have a significant effect on the federal constitutional issue presented in the certiorari petition or the petition for writ of certiorari will be dismissed. *Minnick v. California Department of Correction,* supra.

In this case it is clear that the additional rulings that will have to be made by the Supreme Court of Alabama will have a significant effect on the constitutional issues raised by Lapeyrose. If the Supreme Court of Alabama does not rule in favor of Nelson on her motion to dismiss

and application for rehearing, Lapeyrose will be granted an appeal and their claim for denial of due process and equal protection of the law will be moot. The petition for writ of certiorari currently before the Court in this case is a clear attempt at piecemeal appellate review which is not favored by this Court. *Goldstein v. Cox,* 396 U.S. 471 (1970).

Another reason that Lapeyrouse has not exhausted its remedies in the Courts of Alabama is the fact that Lapeyrouse also has pending an appeal before the Supreme Court of Alabama in Case No. 85-471. (B-56, 57) Lapeyrouse's appeal before the Supreme Court of Alabama in Case No. 85-471 is an appeal from a dismissal by the Circuit Court of Baldwin County, Alabama, of Lapeyrouse's independent action for relief from judgment. This action was filed by Lapeyrouse pursuant to Rule 60(b) of the Alabama Rules of Civil Procedure. Rule 60(b) of the Alabama Rules of Civil Procedure is basically the same rule as contained in the Federal Rules of Civil Procedure. The Circuit Court of Baldwin County, Alabama, dismissed Lapeyrouse's action and refused to set aside the judgment of $561,537.47 and refused to grant Lapeyrouse a new trial. (B-51) Lapeyrouse then filed a notice of appeal to the Supreme Court of Alabama. (B-56) That appeal is currently pending before the Supreme Court of Alabama and was pending at the time this petition for writ or certiorari was filed. As of the date of this response, briefs have not been filed with the Supreme Court of Alabama in that appeal. Due to the pendency of that appeal, Lapeyrouse has not exhausted its remedies in the Supreme Court of Alabama concerning the issues raised in this petition for writ of certiorari.

Due to the pendency of three appeals in the Supreme Court of Alabama, it is obvious that Petitioners have not exhausted their remedies in the Supreme Court of Alabama and the petition for writ of certiorari should be summarily denied. This is certainly true since the Supreme Court of Alabama has currently reinstated Lapeyrouse's appeal, which is the source of Lapeyrouse's complaint of denial of equal protection of law and due process of law.

B. The Dismissal of Lapeyrouse's Appeal by the Supreme Court of Alabama Did Not Constitute a Denial of Equal Protection of Law or Due Process of Law.

The thrust of Lapeyrouse's argument in their petition for writ of certiorari is that they have suffered a deprivation of property while being denied due process of law and equal protection of law due to the Supreme Court of Alabama's ruling that the trial court's order granting a new trial was void and that Lapeyrouse had not filed a timely notice of appeal from the judgment; therefore, the appeal was due to be dismissed. This argument on the part of Lapeyrouse is without merit and does not set forth adequate cause for this Court to grant the petition for writ of certiorari.

Lapeyrouse, in their petition for writ of certiorari, has misrepresented the facts surrounding the basis of the opinion rendered by the Supreme Court of Alabama on October 11, 1985. Lapeyrouse argues to this Court that the Supreme Court of Alabama by judicial interpretation modified the Alabama Rules of Civil Procedure and thus arbitrarily and capriciously denied Lapeyrouse the right of an appeal. Lapeyrouse goes further to argue that prior

to October 11, 1985, Rule 59.1 did not require the entry of an order for the order to effectively dispose of a post-judgment motion. This argument is simply a mischaracterization of the law of Alabama and the facts in this case.

The opinion of the Supreme Court of Alabama rendered on October 11, 1985, is made a part of the Appendix to the petition for writ of certiorari and appears on page A-8. As is shown in the opinion, the Supreme Court of Alabama ruled that an order must be entered pursuant to Rule 58 of the Alabama Rules of Civil Procedure for the order to become effective. The court further ruled that under Rule 59.1 of the Alabama Rules of Civil Procedure, a post-judgment motion cannot remain pending for more than ninety (90) days. Under Alabama law, the failure of a trial court to dispose of a pending motion within ninety (90) days constitutes an automatic denial of that motion. Under Alabama case law and under the Alabama Rules of Civil Procedure, the trial court loses jurisdiction to grant a new trial if the entry of the order is not made within the ninety (90) day period. In this case the order granting new trial was a separate written opinion which was not filed with the Circuit Clerk until November 8, 1984. The order was apparently signed on November 5, 1984, but the order was not effective because it was not filed with the Clerk until November 8, 1984; thus, the order was void since it was filed two days after the ninety (90) day period provided for by Rule 59.1 of the Alabama Rules of Civil Procedure had expired.

Lapeyrouse incorrectly argues in brief that the Supreme Court of Alabama ruled, after all period of appeal for either side had run, that Rule 59.1 required the clerk

to take ministerial action on the written judgment within the ninety (90) day period for the trial court's order to become effective. This is an incorrect statement of the holding of the Supreme Court of Alabama. What the Supreme Court of Alabama held was that the trial judge must take action under Rule 58, Alabama Rules of Civil Procedure, to effectively enter the order in order for that order to become effective and dispose of a post-judgment motion. If the trial court does not make the order effective through the entry of the order prior to the expiration of ninety (90) days pursuant to Rule 59.1, the court has not effectively disposed of the motion and the trial court loses jurisdiction to set aside a judgment pursuant to a post-trial motion. This was made clear in the special concurrence of Chief Justice Torbert which was rendered on November 22, 1985, and which is attached as A-12 of the Appendix to the petition for writ of certiorari.

Lapeyrouse makes a grave mischaracterization of the law when they attempt to argue that the Supreme Court of Alabama changed the rules of procedure by rendering its opinion of October 11, 1985. This is simply not true. As is shown in the special concurrence of Chief Justice Torbert, the trial court can effectively act upon a motion by ruling on it by any of the means set forth in Rule 58(a) of the Alabama Rules of Civil Procedure. The Chief Justice then stated that an order or judgment is not effective for purposes of disposing of a post-judgment motion until an entry of the judgment or order is made. As the Chief Justice stated, this has to be the rule and it is comparable to Rule 58 of the Federal Rules of Civil Procedure; the intent of both rules being "to resolve the same problem, i.e., when is an order or judgment an order or judgment?"

It is ironic that Lapeyrouse now comes to the federal courts in an attempt for relief since the Federal Rules of Civil Procedure have always clearly required an entry of the judgment or order before that judgment or order becomes effective. This is shown from the quote from 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2781 at 6 (1973), which was quoted by Chief Justice Torbert, and which reads as follows:

> "Rule 58 is intended to resolved 'the old, old question of when is a judgment a judgment.' It is of great importance in litigation to know precisely what the judgment is and when it was entered. The time in which to make post-trial motions runs from the entry of judgment as does the time when execution may issue. Most important, however, is the fact that the time for appeal runs from the entry of judgment."

It is interesting to note that Lapeyrouse does not reference the cases relied upon by the Alabama Supreme Court which clearly demonstrated that the filing of a judgment or order was required for that judgment or order to be effective. Examples of the cases of the Supreme Court of Alabama requiring that a separate written judgment must be filed before that judgment can be effective are *Lacks v. Stribling*, 406 So.2d 926 (Ala. Civ. App. 1981); *Holmes v. Powell*, 363 So.2d 760 (Ala. 1978); and *Thompson v. Keith*, 365 So.2d 971 (Ala. 1978). These cases were rendered long before the facts of this case ever developed. An analysis of the Alabama cases on point clearly demonstrates that the Supreme Court of Alabama was correct in granting the petition for writ of mandamus and in declaring the trial court's order granting new trial to be void and outside the ninety (90) day period provided by Rule 59.1 of the Alabama Rules of Civil Procedure. Further-

more, the Courts of Alabama clearly have the power to construe their own rules of civil procedure.

Lapeyrouse also argues in their petition for writ of certiorari that the Supreme Court of Alabama arbitrarily and capriciously denied it a right of appeal. Lapeyrouse's argument to this effect is very weak since apparently it is based on an argument that the Supreme Court of Alabama changed the requirements of Rule 59.1 and that the decision of the Supreme Court of Alabama interpreting Rule 59.1 could not have been anticipated. Such argument is simply without merit.

The appellate courts of the State of Alabama have been very strict in requiring that a notice of appeal be timely filed in order for a party to obtain a right of appeal. The courts have particularly been strict in ruling that a trial court has no jurisdiction to enter an order pursuant to Rule 59 of the Alabama Rules of Civil Procedure where more than ninety (90) days have passed from the time of the party's post-trial motion for new trial or rehearing, and in dismissing appeals that were filed more than forty-two (42) days from the date of the automatic denial under Rule 59.1 of the Alabama Rules of Civil Procedure. *See, Thompson v. Keith,* supra; *Crowder v. Zoning Board of Adjustment,* 406 So.2d 917 (Ala. Civ. App. 1981), *cert. den'd,* 406 So.2d 919 (Ala. 1981); *Carnes v. Carnes,* 365 So.2d 981 (Ala. Civ. App. 1978). Under Alabama law, a trial court has never had the jurisdiction, since the passage of the Alabama Rules of Civil Procedure, to enter an order pursuant to Rule 59 of the Alabama Rules of Civil Procedure where more than ninety (90) days have passed from the time of filing of the party's post-trial motion for new trial, and the time period has not been extended

as provided for in the rule. *French v. Steel, Inc.*, 445 So. 2d 561 (Ala. 1984); *Thompson v. Keith*, supra. Under Alabama law a post-trial motion is pending as of its filing until acted upon by the court and the ninety (90) day period begins to run from the date of filing. *State v. Wall*, 348 So.2d 482 (Ala. 1977). Thus, the argument by Lapeyrouse that the ruling of the Supreme Court of Alabama in its opinion of October 11, 1985, could not be anticipated and was a change of the Alabama Appellate Courts' interpretation of the Alabama Rules of Civil Procedure is simply ludicrous. The decision and opinion of the Supreme Court of Alabama on the petition for writ of mandamus in Case No. 84-424 was easily foreseeable and that is why Nelson's attorneys filed the petition for writ of mandamus.

The reason the Supreme Court of Alabama dismissed the appeal of Lapeyrouse is Lapeyrouse did not timely file a notice of appeal from the judgment for $561,537.47. Lapeyrouse did file a notice of cross-appeal after a precautionary notice of appeal was filed by Nelson from the void order granting Lapeyrouse a new trial. (A-52; A-54) Lapeyrouse's notice of appeal was originally dismissed by the Supreme Court of Alabama due to the fact that Lapeyrouse's notice of cross-appeal was filed on December 26, 1984, which was more than forty-two (42) days from November 6, 1984, which was the date of the automatic denial of the post-trial motions. Lapeyrouse argues to this Court, as it did to the Supreme Court of Alabama, that Rule 4(a) of the Alabama Rules of Appellate Procedure operated to bootstrap their cross-appeal into a timely appeal. This argument was based upon the fact that Nelson filed a precautionary notice of appeal from the trial court's

void order granting new trial. This argument is without merit.

Lapeyrouse contends that the fact Nelson originally filed a notice of appeal from the void order of the trial court granting new trial proved that Nelson's attorneys also thought the order was effective. This is not true. Nelson filed a precautionary notice of appeal in order to cover herself in case the Supreme Court of Alabama for some unexplained reason ruled the trial court's order to be effective or to have been timely filed. Nelson's attorneys elected to take a precaution to protect themselves in case the Supreme Court of Alabama did not rule in their favor. Unlike the precautionary attitude adopted by Nelson's attorneys, attorneys for Lapeyrouse took the approach of not filing a precautionary notice of appeal in case the trial court's order was determined to be void. Since Lapeyrouse did not protect themselves by filing a timely notice of appeal, they deprived themselves of an appeal when the Supreme Court of Alabama correctly ruled that the trial court's order granting new trial was void.

Lapeyrouse's argument concerning the fourteen (14) day period provided for in Rule 4a of the Alabama Rules of Appellate Procedure is also without merit due to the fact that it only applies if an effective appeal is filed within the required forty-two (42) day period. In this case an effective notice of appeal was never filed since the appeal filed by Nelson was an appeal from a void order. Since Nelson filed a notice of appeal from the trial court's order which was a nullity, Nelson's appeal could not operate to bootstrap Lapeyrouse's cross-appeal into a timely filed appeal. This was the reason the Supreme Court of

Alabama originally dismissed Lapeyrouse's appeal which is shown from the following quote from the opinion:

> "Plaintiff filed a notice of appeal and this petition for writ of mandamus. The defendant Lapeyrouse filed a cross-appeal from the order of the trial court denying its motion for judgment notwithstanding the verdict. For the reasons set out below, the plaintiff's appeal is due to be dismissed and the writ of mandamus is due to be issued. The defendant Lapeyrouse's cross-appeal from the order denying its motion for judgment notwithstanding the verdict is due to be dismissed because it was not filed within forty-two (42) days of the order appealed from. It is interesting that the notice of cross-appeal expressly recognizes, and correctly so, that Lapeyrouse appeals 'from the trial court's denial of said defendants' motion for judgment notwithstanding the verdict . . . which denial . . . occurred as a matter of law on November 6, 1984, pursuant to ARCP Rule 59.1.' The notice of cross-appeal was filed on December 26, 1984, beyond forty-two (42) days from November 6, 1984. The plaintiff's superfluous notice of appeal from the purported order granting the motion for new trial would not support an appeal—which the plaintiff recognized and, therefore, filed the petition for writ of mandamus—and does not operate to extend the time for filing the cross-appeal under ARAP Rule 4(a) (2)." (A-9, 10)

Thus, it is clear and logical why the appeal of Lapeyrouse was originally dismissed by the Supreme Court of Alabama. The appeal was not timely filed and, therefore, the Supreme Court of Alabama did not have jurisdiction. Furthermore, the notice of cross-appeal filed by Lapeyrouse was never intended to be an appeal from the judgment entered in favor of Nelson and the notice of appeal fails to state that it is an appeal from that judgment.

It is indeed interesting to note — as pointed out by the Supreme Court of Alabama — that Lapeyrouse expressly recognized in the notice of cross-appeal that all the post-trial motions pending before the trial court were effectively denied on November 6, 1984, by operation of law. Thus, the notice of cross-appeal filed by Lapeyrouse expressly demonstrates that the attorneys for Lapeyrouse were well aware that Rule 59.1 operated to deny all post-trial motions and started the running of the time periods for filing notices of appeal.

The above argument is made to this Court in order to clarify the rulings of the Supreme Court of Alabama. As pointed out earlier in this brief, the Supreme Court of Alabama has not finally disposed of the question of whether Lapeyrouse will be denied an appeal by operation of Alabama law. However, it is clear that Lapeyrouse was not arbitrarily or capriciously denied an appeal; and under the law as interpreted by this Court, Lapeyrouse is not entitled to have the petition for writ of certiorari granted.

It is axiomatic that appeals are a matter of right while the Supreme Court's certiorari decisions are wholly discretionary. *Durham v. United States,* 401 U.S. 481 (1971). It is also clear that this Court will not grant certiorari in a case to consider questions which seemingly present constitutional questions where it appears that those questions are interrelated with rules of court procedure peculiar to the particular state where the constitutionality of those rules are not at issue. *See, Duncan v. Tennessee,* 405 U.S. 127 (1972). In this case the constitutionality of the Alabama Rules of Civil Procedure — which are basically the same as the Federal Rules of Civil Procedure with minor variance — are not challenged as being unconstitutional.

As can be gleaned from the statement of facts and from the argument in this section of the brief, it is clear that the purported constitutional questions raised by Lapeyrouse are as interrelated with the Alabama Rules of Civil Procedure as any issue could ever be. Thus, on the authority of *Duncan v. Tennessee,* supra, certiorari should be denied in this case.

The petition for writ of certiorari should not be granted in this case because there simply will not be a denial of due process of law or equal protection of the law even if Lapeyrouse's appeal is finally dismissed by the Supreme Court of Alabama. This Court has long recognized, even in criminal cases, that due process or equal protection concepts do not require a state to provide an appellate system. *Ortwein v. Schwab,* 410 U.S. 656 (1973); *Lindsey v. Normet,* 405 U.S. 56 (1972); *Griffin v. Illinois,* 351 U.S. 12 (1956); *McKane v. Durston,* 153 U.S. 684 (1894). It is true, however, that once a state provides a right to appeal, that right of appeal cannot be granted for some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause. *Lindsey v. Normet,* supra. However, to show a violation of the equal protection clause or the due process clause, it is imperative that the petitioner show that someone comparably situated has been treated differently from the certiorari petitioner. *National Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37 (1954). In this case Lapeyrouse cannot show that another class of individuals have been treated differently, i.e., given an appeal under similar circumstances, and Lapeyrouse cannot show a denial of due process since discrimination cannot be shown

and since due process does not *per se* require that the state provide a right of appeal. In this case Lapeyrouse cannot show that they have been treated any differently from any other litigant in the State of Alabama.

Finally, the protection of the Fourteenth Amendment to the United States Constitution can only be invoked if the state deprives any person or denies him enforcement of a right guaranteed. U.S. Constitution, Amendment 14; *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). It has not been the policy of the Supreme Court of the United States to satisfy scholarly interest in issues contained in appeals nor does it sit for the benefit of particular litigants. *Rice v. Sioux City Memorial Park Cemetery,* supra. Certiorari, in fact, should not be granted except in cases involving principles of settlement of which are important to the public. *Id.*

In this case, the Supreme Court of Alabama's opinion of October 11, 1985, did not arbitrarily or capriciously deny Lapeyrouse the right of appeal. Lapeyrouse has not been treated any differently than any other litigant in the State of Alabama. All courts, including this Court, require jurisdictional time periods for filing law suits or appeals. In this case Lapeyrouse's attorneys failed to meet these jurisdictional time periods and their appeal was dismissed. This does not constitute a denial of due process of law, nor does it constitute a deprivation of property without due process of law, nor does it constitute a denial of equal protection of law.

CONCLUSION

There is absolutely no basis for this Court to grant the petition for writ of certiorari filed by Lapeyrouse. The issues involved in this case have not been finally decided by the Supreme Court of Alabama; therefore, this court does not have jurisdiction. Even if this Court does determine that the decisions of the Supreme Court of Alabama are final, Lapeyrouse has not been arbitrarily or capriciously denied the right of appeal and Lapeyrouse has not been denied equal protection of law or due process of law. For the reasons stated herein, the petition for writ of certiorari should be summarily and immediately denied.

Respectfully submitted,

/s/ Roger S. Morrow
/s/ Robert M. Alton, Jr.

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APPENDIX

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APPENDIX

IN THE CIRCUIT COURT FOR
BALDWIN COUNTY, ALABAMA

CASE NUMBER CV-83-500016

FLORA JANE NELSON,
d/b/a W. J. NELSON COMPANY,

PLAINTIFF,

vs.

LAPEYROUSE GRAIN CORPORATION,
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA, et al.,

DEFENDANTS.

FIRST AMENDMENT TO COMPLAINT

Comes now the Plaintiff in the above-styled cause and files this her first amendment to the complaint heretofore filed in this cause.

COUNT TWO

Plaintiff adopts the allegations of paragraphs 1 through 20 of the original complaint.

22. Plaintiff avers that the Defendants wrongfully converted to their own use funds belonging to the Plaintiff.

WHEREFORE, Plaintiff claims of the Defendants the sum of $1,000,000.00 as compensatory damages and the sum of $25,000,000.00 as punitive damages together with interest and costs thereof.

COUNT THREE

Plaintiff adopts the allegations of paragraphs 1 through 20 of the original complaint.

23. Plaintiff requests that an accounting be made between the Plaintiff and the Defendants giving effect to the sale on November 5, 1980 of 49,654½ bushels of soybeans at a market price of $9.37 per bushel for a total price of $465,262.66 and that from the accounting between the parties the interest and handling charges pertaining to this sale be removed and that the Defendants be required to pay to the Plaintiff the balance due and owing to Plaintiff together with interest and costs thereof.

COUNT FOUR

Plaintiff adopts the allegations of paragraphs 1 through 20 of the original complaint.

24. Plaintiff avers that prior to October 9, 1981, W. J. Nelson Company was a sole proprietorship, unincorporated entity, owned and operated solely by W. J. Nelson.

25. Plaintiff further avers that on or about October 9, 1981 W. J. Nelson deceased in Baldwin County, Alabama.

26. Plaintiff avers that any indebtedness of W. J. Nelson Company claimed by the Defendants prior and up to October 9, 1981 were debts against W. J. Nelson individually.

27. Plaintiff further avers that the estate of W. J. Nelson has been duly administered in Baldwin County, Alabama and that notices as required by law were published giving notice to all creditors to file claims against the estate of W. J. Nelson, deceased.

28. Plaintiff further avers that the Defendants failed and refused to file any claims for any indebtedness claimed to be owing them by W. J. Nelson Company against said estate.

29. Plaintiff avers that any and all claims of the Defendants arising out of any alleged indebtedness between the Defendants and W. J. Nelson, deceased, are therefore barred by the statute of nonclaims and that the Defendants are barred from asserting any claims against the Plaintiff, Flora Jane Nelson, for such indebtedness.

30. Plaintiff avers that the Defendants are indebted to the Plaintiff, Flora Jane Nelson, in the sum of $1,000,000.00 and that the Plaintiff is not indebted to the Defendants.

.....

Robert M. Alton, Jr.
Attorney for Plaintiff
Suite 302, Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
(205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing First Amendment to Complaint upon the Hon. Caine O'Rear, III, by placing a copy of same in the United States Mail, postage pre-paid and properly addressed.

This the — day of March, 1984.

.....

OF COUNSEL

STATE OF ALABAMA)
BALDWIN COUNTY)

AFFIDAVIT

Before me, Clara H. Smith, a notary public in and for said County and for said State, personally appeared, Barbara M. Judge, Court Clerk, III for the Circuit Court of Baldwin County, who is known to me and who first being duly sworn, doth depose and say as follows, to wit;

1. My name is Barbara M. Judge, and I am over the age of 19 years. I am a Court clerk, III for the Circuit Court of Baldwin County, Alabama. I have personal knowledge of the facts contained in this Affidavit.

2. I personally made the unsigned, handwritten entries of the case action summary sheet in Nelson v. Lapeyrouse Grain Corporation, Case Number CV-83-500016. On the last page of the case action summary sheet is an entry which reads, "Order granting motion for a new trial." Beside that entry is the date 11/5/84. I made that entry on the case action summary sheet on November 8, 1984, which was the date the Register of the Circuit Court of Baldwin County received Judge Claud D. Neilson's Order Granting Motion for New Trial which stated it was signed on November 5, 1984. I entered that Order on the case action summary sheet on November 8, 1984. The date of November 5, 1984, was the date the Judge signed the Order but the Order was not filed with the Register and entered on the case action summary sheet until November 8, 1984. Judge Neilson did not make the entry on the case action summary sheet which reads, "Order granting motion for new trial", because that was the entry that I made on November 8, when I entered his November 5 Order. Further-

more, Judge Claud D. Neilson did not call me on November 5, 1984, directing an entry of an Order for new trial. The first notice that I had of the grant of a new trial was when the Registers' Office received the Order granting new trial on November 8, 1984.

I have read the above and foregoing Affidavit of two pages and I certify that the facts contained therein are true and correct.

/s/ Barbara M. Judge

Sworn to and subscribed before me on this the 2nd day of October, 1985.

/s/ Clara H. Smith
NOTARY PUBLIC
MY COMMISSION EXPIRES:
9/6/89

§ 12-22-10. *Grant or refusal of motion for new trial.*

Either party in a civil case, or the defendant in a criminal case, may appeal to the appropriate appellate court from an order granting or refusing a motion for a new trial by the circuit court. (Code 1896, § 434; Code 1907, § 2846; Acts 1915, No. 656, p. (722; Code 1923, § 6088; Code 1940, T. 7, § 764; Acts 1949, No. 57, p. 81.)

IN THE SUPREME COURT
OF ALABAMA

CASE NO. .....

CIVIL ACTION NO. CV-83-500016

EX PARTE, FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Petitioner

RE: FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Plaintiff

Vs.

LAPEYROUSE GRAIN CORPORATION, LAPEYROUSE GRAIN CORPORATION OF ALABAMA, et al.,

Defendants.

PETITION FOR WRIT OF MANDAMUS

Comes now Flora Jane Nelson, doing business as W. J. Nelson Company, and petitions the above-named Court for Writ of Mandamus to the Honorable Claude D. Neilson,[1] of the Circuit Court of Baldwin County, Alabama, and shows the following in support of this petition:

I

STATEMENT OF FACTS

This action was commenced on or about the 27th day of January, 1983, by the filing of a complaint by Flora Jane Nelson, doing business as W. J. Nelson Company

---

[1]The Circuit Judges for Baldwin County had previously recused themselves and Honorable Claude D. Neilson was appointed as presiding judge in this case on May 23, 1983.

against the Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, and various fictitious parties. In Plaintiff's complaint, Plaintiff sought damages against the Defendants for, *inter alia,* breach of fiduciary duty, and Plaintiff sought an accounting of certain disputed items concerning a running account between merchants. A copy of Plaintiff's complaint is attached hereto as Exhibit "A". Subsequent to the filing of the original complaint, Plaintiff amended her complaint to add additional counts setting forth, *inter alia,* a cause of action against the Defendants for conversion. A copy of the amended complaint is attached hereto as Exhibit "B". Prior to the filing of the amended complaint, this case went before this Court on Petition for Writ of Mandamus seeking this Court to issue an order commanding the Circuit Judge to vacate an order he had entered transferring this case to Mobile, Alabama. *See Flora Jane Nelson, etc. vs. Lapeyrouse Grain Corporation,* 448 So.2d 339 (Ala. 1984). The Defendants filed answers to Plaintiff's complaint and amended complaint and Plaintiff filed Answers to Defendants' Counterclaim. Exhibits "C", "D", "E", and "F".

On or about July 26, 1984, this case came to trial in the Circuit Court of Baldwin County, Alabama. The Honorable Claude D. Neilson heard the case. (See footnote 1) The case was tried by jury and on July 30, 1984, the jury returned a verdict in favor of the Plaintiff and against the Defendants on Plaintiff's complaint and assessed Plaintiff's damages at Five Hundred Sixty-One Thousand Five Hundred Thirty-Seven and 47/100 ($561,537.47) DOLLARS. Exhibit "G" The jury also found in favor of the Plaintiff against the Defendants on Defendants' counterclaim. Exhibit "G". Judgment was filed with the

Circuit Court of Baldwin County, Alabama, on August 9, 1984. Exhibit "G". On August 8, 1984, Defendants filed post trial Motions for Judgment not Withstanding the Verdict and Motion for New Trial. Exhibit "H" and Exhibit "I". The trial court did not file or enter an order on Defendants' post trial motions by November 6, 1984, which was the ninetieth day after the filing of Defendants' post trial motions. The trial court did draft and sign an order granting a Motion for New Trial which was dated November 5, 1984, but this motion was not filed with the Circuit Clerk of Baldwin County until November 8, 1984. Exhibit "J". On December 14, 1984, the trial court entered a corrected order granting Defendants' Motion for New Trial which was dated December 7, 1984. Exhibit "K"

On December 13, 1984, Plaintiff filed a Notice of Appeal to the Supreme Court of Alabama from the orders of the trial court which attempted to grant Defendants' Motion for New Trial after the expiration of the ninety day period provided for in Rule 59.1 of the *Alabama Rules of Civil Procedure*. Exhibit "L" The case is docketed with this court as Case No. 84-294. On December 26, 1984, Defendants filed a Notice of Cross Appeal to the Supreme Court of Alabama from the trial court's denial of Defendants' Motion for Judgment not Withstanding the Verdict with respect to the complaint and with respect to the counterclaim, specifically stating that those denials occurred as a matter of law on November 6, 1984, due to the operation of law.

The Plaintiff has filed contemporaneously with this Petition for Writ of Mandamus, a Motion to Consolidate

for hearing and adjudication this Petition for Writ of Mandamus with the appeal and cross appeal filed by the parties in this case so the court will have before it the entire record of the proceedings that took place in the trial court.

II

THE ISSUE PRESENTED

The sole issue presented in this Petition for Writ of Mandamus is whether the trial court's order granting Defendants' Motion for New Trial which was filed on November 8, 1984, and the subsequent corrected order filed on December 14, 1984, are void as a matter of law due to the operation of Rule 59.1 of the *Alabama Rules of Civil Procedure* or due to the fact Defendants' post trial motions were filed prior to the entry of judgment.

III

RELIEF SOUGHT

Petitioner respectfully requests this Honorable Court to issue a Writ of Mandamus commanding the Honorable Claude D. Neilson, who for this case is the Presiding Judge of the Circuit Court of Baldwin County, Alabama, to vacate his orders granting Defendants' Motion for New Trial, and to further order that the judgment in favor of the Plaintiff and against Defendants in the amount of Five Hundred Sixty-One Thousand Five Hundred Thirty-Seven and 47/100 ($561,537.47) DOLLARS (which was the verdict returned by the jury in the trial of this case) be reinstated and re-entered for all purposes, including the purpose of execution.

IV

REASONS WHY THE WRIT SHOULD ISSUE

The reason this Court should issue the Writ of Mandamus requested by the Plaintiff/Petitioner is the simple reason that the trial court lost jurisdiction to grant Defendants' Motion for New Trial on November 6, 1984, due to the operation of Rule 59.1 of the *Alabama Rules of Civil Procedure*. Rule 59.1 of the *Alabama Rules of Civil Procedure* states in pertinent part that:

> "No post-trial motion filed pursuant to Rules 50, 52, or 59 shall remain pending in the trial court for more than 90 days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. *A failure by the trial court to dispose of any pending post-trial motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.*" (Emphasis supplied)

In this case the jury returned a verdict in favor of the Plaintiff for Five Hundred Sixty-One Thousand Five Hundred Thirty-Seven and 47/100 ($561,537.47) DOLLARS on July 30, 1984. Exhibit "G" The trial court did not enter an order based upon the jury's verdict until August 9, 1984. Under Rule 4 of the *Alabama Rules of Appellate Procedure*, the filing of a post-trial motion pursuant to ARCP Rule 59 will stay the running of the forty-two (42) day period for filing a notice of appeal; however, Rule 59.1 of the *Alabama Rules of Civil Procedure* states that the motion is automatically denied at the expiration of ninety (90) days. Under the facts of this case, Defend-

ants' post trial motions were automatically denied by operation of law on November 6, 1984, which was the ninetieth day from the date of the filing of the post trial motions. Defendants admit this in their Notice of Cross-Appeal which states that their Motions for Judgment Notwithstanding the Verdict were denied as a matter of law on November 6, 1984. Exhibit "M"

Under Alabama law, the trial court has no jurisdiction to enter an order pursuant to Rule 59, *Alabama Rules of Civil Procedure,* where more than ninety (90) days have passed from the time of the parties post-trial motion for new trial or rehearing and where such motion has not been ruled upon in the time during which such motion could remain pending and the time period has not been extended. *French v. Steel, Inc.,* 445 So.2d 561 (Ala.1984); *Thompson v. Keith,* 365 So.2d 971 (Ala.1978); *McKinley v. Colonial Life & Accident Ins. Co.,* 410 So.2d 73 (Ala.Civ.Appeals 1982); *Carnes v. Carnes,* 365 So.2d 981 (Ala.Civ.Appeals 1978), cert. denied, 365 So.2d 985 (Ala.1979). A post-trial motion is pending as of its filing and until acted upon by the court and the ninety (90) day period begins to run from the date of filing. *State v. Wall,* 348 So.2d 482 (Ala. 1977).

In this case the Defendants' post-trial motions were clearly denied by operation of law on November 6, 1984, which was ninety days from the date the post-trial motions were filed with the Circuit Court. Indeed, Defendants in their own Notice of Cross-Appeal to this court have admitted that November 6, 1984, was the day the post-trial motions were deemed denied by operation of law. Exhibit "M"

It is anticipated that Defendants may argue that since the trial court's order states it was signed on November 5, 1984, the Rule 59.1 time period does not apply. If this argument is made it is totally without merit since the record clearly shows that the trial court's order was not filed until November 8, 1984; thus, the order was not effective until November 8, 1984, which was more than ninety (90) days after the filing of the post-trial motion.

Under Alabama law, a separate written judgment must be filed before that judgment can become effective. Rule 58, ARCP; *Lacks v. Stribling,* 406 So.2d 926 (Ala. 1981); *Holmes v. Powell,* 363 So.2d 760 (Ala.1978). This court held in *Lacks v. Stribling,* supra, as follows, to-wit:

> "A separate judgment may be signed by the trial judge, but it is not effective until he authorizes that it be filed with the clerk or register, even if the filing date is several days, weeks, or even months later than the date reflected on a judgment. When a separate judgment is filed, the filing thereof constitutes the entry of judgment and would take preference over an additional attempted entry thereof by the clerk or register by any other method of entering authorized by Rule 58(c). To hold as contended by *Lacks,* supra, would mean that if adequate time differed between the date of entry by the Clerk on the case action summary and the date of the filing of the separate judgment, the Clerk could effectively eliminate a motion for new trial (if the difference was more than thirty days), or even an appeal (if the difference was more than forty-two days) such construction is contrary to the spirit of modern judicial philosophy. (citation omitted)
>
> We determined that the judgment dated July 2 was entered when it was filed by the register on July 9, that such entry prevails and we are not governed in this matter by the actions of the register in placing

> the July 2 date and "Order of the Court" on the case action summary, and the Stribling motion of August 8 was timely filed." 406 So.2d at 930

From reading the preceding excerpt from *Lacks v. Stribling,* supra, it is clear that a separate written order of the Court is not effective until that order is filed with the clerk or register. The date that appears on the order is not controlling but the actual filing of the judgment constitutes the date when the judgment becomes effective and is controlling and is the date from which time periods are calculated. The court in *Lacks v. Stribling,* supra, held that it does not matter if the date on the order is several weeks prior to the filing date, the date for computation of time periods under the *Alabama Rules of Civil Procedure* will be the date the order is filed and this is true even if the docket sheet entry shows a different date.

The filing of a judgment or order in the office of the clerk constitutes the entry of the judgment for purposes of computing time periods under the rules. *See* e.g., *Holmes v. Powell,* supra. In this case the record clearly shows that the trial court's first order granting Defendants a new trial was not filed with the register until November 8, 1984. This is shown by the filing stamp which appears on the order granting Defendants' Motion for New Trial. Thus, the order granting Defendants' Motion for New Trial is void due to the fact that the ninety day time period under Rule 59.1 had expired and Defendants' Motion for New Trial was automatically denied on November 6, 1984. Similarly, the trial court's corrected order which was filed on December 14, 1984, was clearly past the ninety day time period and void and of no effect.

It is totally clear from the record in this case that the trial court's orders in this case granting Defendants a new trial are void and that the trial court lost all jurisdiction to grant a new trial by allowing the ninety day time period under Rule 59.1, APCP, to expire. The cases in Alabama have uniformly held that the ninety day time period provided for in Rule 59.1 is a jurisdictional requirement and if such time period expires the trial court is without power to grant relief pursuant to a post-trial motion for a new trial or motion for JNOV. Alabama law is also clear that the date which appears on a written order of the trial court is not controlling for the purpose of computing time periods but that the date of filing is controlling. *See* e.g., *Lacks v. Stribling,* supra.

The trial court's orders granting Defendants' Motion for New Trial are also void because Defendants post-trial motions for new trial were not timely or properly filed with the Court pursuant to Rule 59, ARCP.

Rule 59(b), ARCP provides:

> "(b) *Time for Motion.* A motion for a new trial shall be filed not later than 30 days *after the entry of judgment.*" (emphasis supplied)

Rule 59(d), ARCP provides:

> "(d) *On initiative of court.* Not later *than 30 days after entry of judgment* the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor." (emphasis supplied)

In this case, Defendants filed their post-trial motions prior to the entry of judgment and *not after* the entry of the judgment. Thus, a motion for new trial was not timely

or properly filed and a motion for new trial was never properly before the trial court. Furthermore, the trial court's order granting Defendants a new trial was entered more than thirty days after the entry of judgment; thus, the court was without jurisdiction to grant a new trial since a motion for new trial was not properly filed.

For these reasons, the Petitioner respectfully requests that this Court issue the Writ of Mandamus vacating the trial court's orders granting the Defendants a new trial, and further requiring the Court to reinstate the judgment it entered on July 30, 1984, which was based upon the jury's verdict in this case.

V

The following documents are enclosed or attached which are essential to an understanding of the matters set forth above:

Exhibit "A" — Complaint

Exhibit "B" — Amended Complaint

Exhibit "C" — Answer to Complaint

Exhibit "D" — Answer to Amended Complaint

Exhibit "E" — Answer to Counterclaim

Exhibit "F" — Amended Answer to Counterclaim

Exhibit "G" — Judgment

Exhibit "H" — Docket Sheet

Exhibit "I" — Post Trial Motions

Exhibit "J" — Order Granting New Trial

Exhibit "K" — Corrected Order

Exhibit "L" — Notice of Appeal

Exhibit "M" — Notice of Cross-Appeal

Petitioner would also refer the trial court to the record on appeal in Case No. 84-294, styled *"Flora Jane Nelson, etc., Appellant, vs. Lapeyrouse Grain Corporation, et al., Appellees"*.

WHEREFORE, THE PREMISES CONSIDERED, Petitioner prays that the Court grant the petition and order that an answer to the petition be filed by the Respondents.

I certify that I have this day served copies of this petition on the Respondent Judge and all other parties to the action in the trial court.

Respectfully submitted,

/s/ Roger S. Morrow
/s/ Robert M. Alton, Jr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing Petition on the following, by mailing same postage prepaid to their respective offices:

Hon. Claude D. Neilson
Presiding Circuit Judge
P. O. Box 489
Demopolis, Alabama 36732

Hon. Caine O'Rear
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601
(205) 433-5511

HON. CHARLES C. PARTIN
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 28th day of January, 1985.

/s/ ROGER S. MORROW
OF COUNSEL

IN THE SUPREME COURT
OF ALABAMA

ON APPEAL SUPREME COURT

CASE NO. 84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Appellant,

vs.

LAPEYROUSE GRAIN CORPORATION and
LAPEYROUSE GRAIN CORPORATION OF
ALABAMA, et al.,

Appellee.

ON CROSS-APPEAL SUPREME COURT

CASE NO. 84-342

LAPEYROUSE GRAIN CORPORATION,

Appellant,

vs.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Appellee.

CASE NO. ———

CIVIL ACTION NO. CV-83-500016

EX PARTE, FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Plaintiff, Petitioner,

RE: FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

vs.

LAPEYROUSE GRAIN CORPORATION, LAPEYROUSE GRAIN CORPORATION OF ALABAMA, et al.,

Defendants.

MOTION TO CONSOLIDATE

(Filed January 28, 1985)

Comes now Appellant/Petitioner, Flora Jane Nelson, doing business as W. J. Nelson Company, by and through her undersigned counsel, and moves this Honorable Court to consolidate for purposes of hearing and adjudication Flora Jane Nelson's Petition for Mandamus with the above-styled appeal bearing Supreme Court Case No. 84-294, and the above-styled cross-appeal filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, bearing Supreme Court Case No. 84-342. Appellant/Petitioner sets forth the following grounds in support of this Motion, to-wit:

1. That all issues involved in the Petition for Writ of Mandamus, the appeal and the cross-appeal are interrelated and involve the same transactions and case;

2. That the record which has been filed or will be filed in Case Nos. 84-294 and 84-342 contain the same

transcripts, pleadings, motions, and other documents that will be helpful in ruling on the Petition for Writ of Mandamus;

3. That some of the issues involved in all three proceedings before this Court are identical or similar.

WHEREFORE, THESE PREMISES CONSIDERED, Appellant/Petitioner, Flora Jane Nelson, respectfully requests this Honorable Court to consolidate all three cases for adjudication and hearing.

/s/ ROGER S. MORROW

OF COUNSEL:
WHITESELL, MORROW & ROMINE, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
(205) 262-1967

/s/ ROBERT M. ALTON, JR.

Attorneys for Petitioner

OF COUNSEL:
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
(205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing Petition on the following, by mailing same postage prepaid to their respective offices:

HON. CLAUDE D. NEILSON
Presiding Circuit Judge
P. O. Box 489
Demopolis, Alabama 36732

HON. CAINE O'REAR
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601
(205) 433-5511

Hon. Charles C. Partin
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 28th day of January, 1985.

/s/ Roger S. Morrow
OF COUNSEL

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT CASE NO. 84-342

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF AMERICA,

Cross-Appellants,

vs.

FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY,

Cross-Appellee.

MOTION TO DISMISS CROSS-APPEAL OF DEFENDANTS/APPELLEES LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA

(Filed January 28, 1985)

Comes now Cross-Appellee, Flora Jane Nelson, doing business as W. J. Nelson Company, by and through her undersigned counsel, and moves this Honorable Court to dismiss the Cross-Appeal of Cross-Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, on the following grounds, to-wit:

1. Said appeal was filed more than forty-two (42) days after November 6, 1984, which was the date that Cross-Appellants' post-trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama Rules of Civil Procedure;*

2. That although Cross-Appellants filed their notice of cross-appeal within fourteen (14) days of the date Flora Jane Nelson filed her notice of appeal, ARAP Rule 4(a)2 does not operate to make the filing of Cross-Appel-

lant's notice of appeal timely because Flora Jane Nelson's appeal was taken from a void order granting a motion for new trial;

3. That the trial court's order granting a new trial to Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama is void due to the operation of Rule 59.1, ARCP;

4. That the Cross-Appeal of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama was not timely filed therefore the Supreme Court of Alabama has no jurisdiction to entertain the Cross-Appeal.

5. That the notice of cross appeal was not timely filed due to the fact that the post trial motions filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama were filed prior to the entry of judgment and therefore did not suspend the forty-two (42) day time period for filing a Notice of Appeal.

WHEREFORE, THESE PREMISES CONSIDERED, Cross-Appellee, Flora Jane Nelson, respectfully requests this Honorable Court to dismiss the Cross-Appeal filed by Cross-Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama.

/s/ Roger S. Morrow

OF COUNSEL:
Whitesell, Morrow & Romine, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
(205) 262-1967

/s/ Robert M. Alton, Jr.

Attorneys for Petitioner

OF COUNSEL:
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
(205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing Petition on the following, by mailing same postage prepaid to their respective offices:

HON. CAINE O'REAR
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601
(205) 433-5511

HON. CHARLES C. PARTIN
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 28th day of January, 1985.

/s/ ROGER S. MORROW
OF COUNSEL

September 30, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
84-424

EX PARTE: FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY

PETITION FOR WRIT OF MANDAMUS

(In Re: Flora Jane Nelson, d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al.)

IT IS ORDERED, ex mero motu, that this cause be placed on rehearing.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 30th day of September, 1985.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT
OF THE STATE OF ALABAMA

SUPREME COURT CASE NO: 85-393

LAPEYROUSE GRAIN CORPORATION and
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA,

Appellants/Defendants,

vs.

FLORA JANE NELSON d/b/a
W. J. NELSON COMPANY,

Appellee/Plaintiff.

MOTION TO DISMISS APPEAL OF APPELLANTS,
LAPEYROUSE GRAIN CORPORATION AND
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

(Filed January 17, 1986)

Comes now the Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, by and through her undersigned counsel, and moves this Honorable Court to dismiss the appeal and notice of appeal filed by Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, in the above styled case on the following grounds, to wit:

1. That Appellants'/Defendants' notice of appeal was filed more than 42-days after November 6, 1984, which was the date that Appellants' post trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama Rules of Civil Procedure.* A copy of the judgment of the Circuit Court is attached hereto as Exhibit "A". A copy of Appellees' notice of appeal is attached hereto as Exhibit "B".

2. That this Honorable Court has ruled as a matter of law that Appellants/Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, have waived their right of appeal of the judgment entered in this case. That this Court reached this decision in the cases of *Ex parte Floras Jane Nelson d/b/a W. J. Nelson Company,* Supreme Court Case Number 84-424, *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, et al,* Supreme Court Case Number 84-294, and in *Lapeyrouse Grain Corporation v. Flora Jane Nelson d/b/a W. J. Nelson Company,* (October 11, 1986) Supreme Court Case Number 84-342. A copy of the relevant mandates of this Court are attached hereto as Exhibits "C", "D" and "E".

3. That in the case of *Ex parte: Flora Jane Nelson d/b/a W. J. Nelson Company,* Supreme Court Case Number 84-424, (October 11, 1986) this Honorable Court specifically held that the Appellants/Defendants Lapeyrouse had failed to file a timely notice of appeal within 42 days of the Rule 59.1 denial of their post trial motions and therefore dismissed Defendants' appeal (which was a cross appeal) in case number 84-342, styled *Lapeyrouse Grain Corporation v. Nelson.* In that opinion this Court specifically held that Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, had filed their notice of appeal beyond 42 days from November 6, 1984, and that their appeal was therefore due to be dismissed on jurisdictional grounds. A copy of this Court's opinion in Supreme Court Case Number 84-424 is attached hereto as Exhibit "F".

4. That in *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company,* Supreme Court Case Number 84-424, this

Court issued a mandate ordering Honorable Claud D. Neilson, Circuit Judge, to enter an Order setting aside his void Order dated November 5, 1984, which granted a motion for new trial in the case of *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al,* Baldwin Circuit Court case number CV-83-500016. A copy of that mandate is attached hereto as Exhibit "C".

5. That pursuant to the mandate of this Court, Judge Claud D. Neilson entered an Order on December 16, 1985, (dated December 12, 1985) setting aside the void Order dated November 5, 1984. A copy of said Order is attached hereto as Exhibit "G".

6. That Appellants'/Defendants' notice of appeal is from the Order of Judge Claud D. Neilson entered on December 16, 1985, dated December 12, 1985, which was entered pursuant to this Court's Order.

7. That the December 12, 1985, Order of Judge Claud D. Neilson does not support an appeal in this case. A copy of said Order is attached hereto as Exhibit "G".

8. That the appeal filed by Appellants/Defendants is a blatantly frivolous appeal which attempts to appeal an issue already decided by this Court; namely, whether the Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama can appeal the judgment entered in this case after the 42 day jurisdictional time period for the filing of a notice of appeal has expired.

9. That the notice of appeal in this case was filed more than 42 days after November 6, 1984, which was the date that the Appellants' post trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama*

Rules of Civil Procedure; therefore, Appellants' notice of appeal was not timely filed and the Supreme Court of Alabama thus has no jurisdiction to entertain the appeal.

10. That Appellants' notice of appeal should be dismissed on the grounds of *res judicata* and/or collateral estoppel in that this Court has already decided as a matter of law that Appellants' notice of appeal was not timely filed and thus Appellants are precluded from appealing the judgment entered in this case or any of the Orders listed in Appellants' notice of appeal.

11. That this Court should immediately dismiss the appeal filed by the Appellants in this case in that the Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, have not filed a timely notice of appeal; therefore, the Supreme Court of Alabama does not have jurisdiction to entertain this appeal.

12. That Appellants/Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, filed a supersedeas bond with this appeal which has the effect of staying execution by the Plaintiff on the judgment. That this stay of execution may cause irreparable harm to the Appellee/Plaintiff since the amount of supersedeas bond is $701,921.84 (125% of the original judgment) and since the amount of judgment, including accrued interest plus penalty, now approximately equals or exceeds $701,921.84 due to the length of time that has expired since the original entry of judgment. Furthermore, Appellee had filed and served a writ of garnishment on Appellants' bank account prior to the filing of the supersedeas bond.

13. That since Appellants' appeal has already been dismissed, this appeal is totally frivolous.

14. That Appellee, Flora Jane Nelson, is entitled to damages for a frivolous appeal pursuant to Rule 38 of the *Alabama Rules of Appellate Procedure* which would include an award of a reasonable attorneys' fees.

15. That the Appellee, Flora Jane Nelson, is entitled to the 10% penalty provided by statute for an unsuccessful appeal when a supersedeas bond is posted.

WHEREFORE, THESE PREMISES CONSIDERED, Appellee/Plaintiff, Flora Jane Nelson, respectfully requests this Court for the following relief, to wit:

1. An Order dismissing the above styled appeal and notice of appeal filed by Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama.

2. An award of damages for the filing of a frivolous appeal which would include an award to Appellee's attorneys of a reasonable attorneys' fee.

3. The imposition of the 10% penalty for an unsuccessful appeal as provided for by statute in cases where a supersedeas bond is filed.

4. An Order declaring the forfeiture of the Appellants' supersedeas bond in the event they do not immediately pay to Appellee the amount of the judgment, plus accrued interest, penalty, attorneys' fees and damages ordered by this Court.

5. Such other, further and additional relief to which Appellee/Plaintiff may be entitled, the premises considered.

/s/ Roger S. Morrow
Attorney for Appellee

OF COUNSEL:
WHITESELL, MORROW & ROMINE
P. O. Box 2450
Montgomery, Alabama 36103
Telephone: (205) 262-1967

/s/ Robert M. Alton, Jr.
Attorney for Appellee

OF COUNSEL:
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
Telephone: (205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Honorable Caine O'Rear, III, HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON, P. O. Box 123, Mobile, Alabama, 36601, by placing a copy of the same in the United States mail, postage fully prepaid, on this the 17th day of January, 1986.

/s/ Roger S. Morrow
OF COUNSEL

B-33

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

FEBRUARY 28, 1986

BALDWIN CIRCUIT COURT CV-83-500016
85-393

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

ORDER

The appellants having filed an application for rehearing from the dismissal of the appeal in this cause, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the appellants' application for rehearing is overruled.

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, Beatty, JJ., concur.

Adams and Houston, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 28th day of Feb. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

FEBRUARY 28, 1986

BALDWIN CIRCUIT COURT CV-83-500016

84-342

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

ORDER

Because, upon further consideration of this case, the Court is of the opinion that this appeal should not have been dismissed at the time the petition for writ of mandamus was granted in 84-424, *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company* (*In re*: *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama*),

IT IS ORDERED, *ex mero motu,* that the appeal in 84-342 filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama be reinstated, and the Clerk of the Circuit Court of Baldwin County is directed to return forthwith to this Court the certificate of judgment issued in this cause on December 10, 1985.

IT IS FURTHER ORDERED that the Reporter of Decisions of this Court withhold from final publication the opinion of this Court in 84-424, *Ex parte Flora Jane Nelson Company,* pending the further orders of this Court.

IT IS FURTHER ORDERED that the time for Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama to file their appellants' brief in 84-342 shall commence on March 3, 1986, and the time for filing and serving briefs shall be governed by Rule 31(a), Alabama Rules of Appellate Procedure.

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, Beatty, JJ., concur.

Adams and Houston, J., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 28th day of Feb. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

B-36

IN THE SUPREME COURT OF ALABAMA

MARCH 5, 1986

BALDWIN CIRCUIT COURT CV-83-500016

84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

v.

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

ORDER

Because, upon further consideration of this case, the Court is of the opinion that this appeal should not have been dismissed at the time the petition for writ of mandamus was granted in 84-424, *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company* (*In re*: *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama*),

IT IS ORDERED, *ex mero motu,* that the appeal in 84-294 filed by Flora Jane Nelson d/b/a W. J. Nelson Company be reinstated, and the Clerk of the Circuit Court of Baldwin County is directed to return forthwith to this Court the certificate of judgment issued in this cause on December 10, 1985.

IT IS FURTHER ORDERED that the Reporter of Decisions of this Court withhold from final publication the opinion of this Court in 84-424, *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company,* pending the further orders of this Court.

IT IS FURTHER ORDERED that the position of Flora Jane Nelson d/b/a W. J. Nelson Company will be

that of a cross-appellant, and an appellee's/cross-appellant's brief should be filed within twenty-one (21) days of service of the appellants' brief, i.e. Lapeyrouse Grain Corporation's and Lapeyrouse Grain Corporation of Alabama's brief in 84-342.

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, and Beatty, JJ., concur.

Adams and Houston, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 6th day of Mar. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

MARCH 6, 1986

BALDWIN CIRCUIT COURT CV-83-500016

84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

v.

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

BALDWIN CIRCUIT COURT CV-83-500016

84-342

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

84-424

EX PARTE FLORA JANE NELSON d/b/a
W. J. NELSON COMPANY

PETITION FOR WRIT OF MANDAMUS
(IN RE: FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY V. LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA)

B-39

BALDWIN CIRCUIT COURT CV-83-500016

85-393

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

ORDER

This Court having considered its prior orders in these cases, and finding it necessary to clarify the orders,

IT IS ORDERED as follows:

1. That the opinion in 84-424 is temporarily withdrawn from final publication, but that this Court's decision that the motion for new trial was overruled by operation of law remains unaffected; and

2. That the position of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama will be that of appellants, and they may brief the arguments, for example, that they were entitled to judgment notwithstanding the verdict or a new trial although an issue will be whether Lapeyrouse Grain Corporation's and Lapeyrouse Grain Corporation of Alabama's notice of appeal limits them to arguing only the judgment notwithstanding the verdict issue; and

3. That execution on the judgment in CV-83-500016 is stayed for a period of seven (7) days from the date of this order in order to allow Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama the opportunity to file in the trial court a supersedeas bond.

Torbert, C. J., Maddox, Jones, Shores, and Adams, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 6th day of Mar. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT CASE NO. 84-342

BALDWIN COUNTY CIRCUIT
COURT NO. CV-83-50016

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Appellants,

vs.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Appellee.

APPLICATION FOR REHEARING

(Filed March 13, 1986)

Comes now Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, and files this application for rehearing from the order of this Court issued on February 28, 1986, and the amended Order of March 6, 1986, and moves this Honorable Court to grant a rehearing concerning said Orders and to further withdraw and vacate said Orders. As grounds for this motion, the movant shows the Court as follows:

1.) The Court did not have jurisdiction to issue the Order of February 28, 1986, which reinstated the appeal of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter referred to as Lapeyrouse).

2.) That the certificate of judgment issued on December 10, 1985, in the above styled appeal was a final

judgment and this Court did not have jurisdiction or authority to amend or withdraw that certificate of judgment on February 28, 1986.

3.) That principles of finality, res judicata and collateral estoppel prevent this Court from withdrawing its Order of December 10, 1985, causing a relitigation of the issues presented in that appeal.

4.) That this Court is without authority or jurisdiction to rescind or withdraw its Order of December 10, 1985, which finally dismissed the above styled appeal due to the fact that Lapeyrouse had timely filed an application for rehearing which addressed the dismissal of their appeal and due to the fact that this Court rejected the arguments of the Defendants and entered a final judgment of dismissal on December 10, 1985.

5.) That this Court is without authority and without jurisdiction to amend, modify, vacate or rescind its final judgment of December 10, 1985, dismissing the above styled appeal on the ground that more than thirty days had elapsed since the entry of a final judgment of dismissal of the appeal, therefore ARCP Rule 59 bars the Court from modifying its order *ex mero motu.*

6.) That this Court is without authority or jurisdiction to vacate, rescind or withdraw its judgment of December 10, 1985, in that said judgment dismissing the appeal on December 10, 1985, became a final judgment after the allowance of an application for rehearing and that Rule 40 of the Alabama Rules of Appellate Procedure specifically prohibits this Court from granting a second application for rehearing in a case. The effect of this

Court's Order of February 28, 1986, was the allowance of a second application for rehearing through the subterfuge of a brief filed in the case styled *Lapeyrouse Grain Corporation, et al., v. Flora Jane Nelson,* Supreme Court Case No. 85-393. That this Court committed error in reversing its earlier decision dismissing the above styled appeal and that the reasoning originally contained in this Court's opinion issued on October 11, 1985, and affirmed on November 22, 1985, in Case No. 84-424 was correct.

7.) That the above styled appeal should be dismissed and was correctly dismissed by this Court due to the fact that the notice of appeal was filed after the lapse of the forty-two (42) day period for filing the appeal, therefore this Court has no jurisdiction to entertain the appeal.

8.) That this Court's Order of February 28, 1986, constitutes a violation of the rights guaranteed to Plaintiff/Appellee under the Fifth and Fourteenth Amendments (equal protection clause and/or due process clause) to the Constitution of the United States of America; Article 1, Sections 1, 10 and 13, Constitution of Alabama, 1901; Amendment No. 328, Article 6, Section 6.01 and/or 6.02, Constitution of Alabama, 1901 (as amended), and/or Section 12-2-7, Code of Alabama, 1975.

9.) That the operation and/or effect of this Court's Order of February 28, 1986, reversing an earlier final decision of this Court and reinstating Defendants' appeal operates as a denial of due process of law and equal protection under the law due to the fact that said reinstatement violates prior opinions and decisions of this Court and gives unequal treatment and advantage to Defendants

Lapeyrouse that have not been previously given other litigants under the laws of this state.

WHEREFORE, THE PREMISES CONSIDERED, Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, respectfully requests this Honorable Court to grant her application for rehearing, to withdraw, rescind and vacate its Order of February 28, 1986, as later amended on March 6, 1986, and to enter an order finally dismissing the above styled appeal. Additionally, Appellee requests the Court to enter an Order staying any further additional briefs on the merits of the appeal in the above styled case until this Court has ruled on Plaintiff/Appellee's application for rehearing and motion to dismiss the above styled appeal.

/s/ Roger S. Morrow

OF COUNSEL

Whitesell, Morrow & Romine, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
205-262-1967

/s/ Robert M. Alton, Jr.

Attorneys for Plaintiff/Appellee

302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
205-834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing document on the following, by mailing same postage prepaid to their respective offices:

Hon. Caine O'Rear
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601

Hon. Charles C. Partin
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 13th day of March, 1986.

/s/ Roger S. Morrow
OF COUNSEL

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT CASE NO. 84-342

BALDWIN COUNTY CIRCUIT COURT NO. CV-83-50016

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Appellants,

vs.

FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY,

Appellee.

MOTION TO DISMISS APPEAL OF APPELLANTS/DEFENDANTS, LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA

(Filed March 13, 1986)

Comes now Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, by and through the undersigned counsel, and moves this Honorable Court to dismiss the appeal and notice of appeal filed by the Appellants, Lapeyrouse Grain Corporation, and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively designated as Lapeyrouse), in the above styled case on the following grounds, to-wit:

1.) Said appeal was filed more than forty-two (42) days after November 6, 1984, which was the date that Lapeyrouse's post-trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama Rules of Civil Procedure.*

2.) That although Lapeyrouse filed their notice of cross-appeal within fourteen (14) days of the date Flora

Jane Nelson filed her notice of appeal, ARAP Rule 4(a)(2) does not operate to make the filing of Cross-Appellant's notice of appeal timely because Flora Jane Nelson's appeal was taken from a void order granting a motion for new trial.

3.) That the trial court's order granting a new trial to Lapeyrouse is void due to the operation of Rule 59.1, ARCP.

4.) That the Cross-Appeal of Lapeyrouse was not timely filed; therefore the Supreme Court of Alabama has no jurisdiction to entertain the Cross-Appeal.

5.) The Court did not have jurisdiction to issue the Order of February 28, 1986, which reinstated the appeal of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter referred to as Lapeyrouse).

6.) That the certificate of judgment issued on December 10, 1985, in the above styled appeal was a final judgment and this Court did not have jurisdiction or authority to amend or withdraw that certificate of judgment on February 28, 1986.

7.) That principles of finality, res judicata and collateral estoppel prevent this Court from withdrawing its Order of December 10, 1985, causing a relitigation of the issues presented in that appeal.

8.) That this Court is without authority or jurisdiction to rescind or withdraw its Order of December 10, 1985, which finally dismissed the above styled appeal due to the fact that Lapeyrouse had timely filed an applica-

tion for rehearing which addressed the dismissal of their appeal and due to the fact that this Court rejected the arguments of the Defendants and entered a final judgment of dismissal on December 10, 1985.

9.) That this Court is without authority and without jurisdiction to amend, modify, vacate or rescind its final judgment of December 10, 1985, dismissing the above styled appeal on the ground that more than thirty days had elapsed since the entry of a final judgment of dismissal of the appeal, therefore ARCP Rule 59 bars the Court from modifying its order *ex mero motu.*

10.) That this Court is without authority or jurisdiction to vacate, rescind or withdraw its judgment of December 10, 1985, in that said judgment dismissing the appeal on December 10, 1985, became a final judgment after the allowance of an application for rehearing and that Rule 40 of the Alabama Rules of Appellate Procedure specifically prohibits this Court from granting a second application for rehearing in a case. The effect of this Court's Order of February 28, 1986, was the allowance of a second application for rehearing through the subterfuge of a brief filed in the case styled *Lapeyrouse Grain Corporation, et al., v. Flora Jane Nelson,* Supreme Court Case No. 85-393. That this Court committed error in reversing its earlier decision dismissing the above styled appeal and that the reasoning originally contained in this Court's opinion issued on October 11, 1985, and affirmed on November 22, 1985, in Case No. 84-424 was correct.

11.) That the above styled appeal should be dismissed and was correctly dismissed by this Court due to the fact that the notice of appeal was filed after the lapse

of the 42-day period for filing the appeal, therefore this Court has no jurisdiction to entertain the appeal.

12.) That this Court's Order of February 28, 1986, constitutes a violation of the rights guaranteed to Plaintiff/Appellee under the Fifth and Fourteenth Amendments (equal protection clause and/or due process clause) to the Constitution of the United States of America; Article 1, Section 1, 10 and 13, Constitution of Alabama, 1901; Amendment No. 328, Article 6, Section 6.01 and/or 6.02, Constitution of Alabama, 1901 (as amended); and/or Section 12-2-7, Code of Alabama, 1975.

13.) That the operation and/or effect of this Court's Order of February 28, 1986, reversing an earlier final decision of this Court and reinstating Defendants' appeal operates as a denial of due process of law and equal protection under the law due to the fact that said reinstatement violates prior opinions and decisions of this Court and gives unequal treatment and advantage to Defendants Lapeyrouse that have not been previously given other litigants under the laws of this state.

WHEREFORE, THE PROMISES CONSIDERED, Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, respectfully requests this Honorable Court to dismiss the above styled appeal and to tax all costs of this proceeding against the Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama. Additionally, Plaintiff/Appellee requests this Court to enter an Order staying any further additional briefs on the merits of the appeal in the above styled case until this Court has ruled of Plaintiff/Appellee's application for rehearing and motion to dismiss the above styled appeal.

/s/ Roger S. Morrow

OF COUNSEL

Whitesell, Morrow & Romine, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
205-262-1967

/s/ Robert M. Alton, Jr.
Attorneys for Plaintiff/Appellee

302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
205-834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing document on the following, by mailing same postage prepaid to their respective offices:

Hon. Caine O'Rear
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601

Hon. Charles C. Partin
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 13 day of March, 1986.

/s/ Roger S. Morrow
OF COUNSEL

B-51

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

CASE NUMBER CV-85-500231

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Plaintiffs

vs

FLORA JANE NELSON, individually and d/b/a W. J. NELSON COMPANY,

Defendant

ORDER

(Filed January 3, 1986)

This cause came before the Court on Petitioner Lapeyrouse's complaint, which included a prayer for temporary restraining order, and Respondent Nelson's Motion to Dismiss, and Motion to Dissolve the temporary restraining order. The TRO was granted on December 11, 1985, and a hearing set for December 20, 1985, at which time the court heard argument of counsel for both parties and extended the TRO until January 2, 1986, to allow the court adequate time to review the pleadings, exhibits, briefs and arguments of counsel.

Lapeyrouse's petition calls upon the court to grant it permanent relief from a judgment on four (4) basic grounds: first, that the judgment would have been set aside except for mistake, inadvertence, accident or excusable neglect on the part of the Judge, the court personnel, or both; second, that equity and good conscience so demand; third, that Lapeyrouse has good defense to Nelson's original claim and meritorious grounds for its counterclaim;

and fourth, that it has no adequate remedy at law. Additionally, the complaint asks for an injunction prohibiting execution on the judgment pending the outcome of this action.

The facts giving rise to this action are, briefly, as follows:

1. After a trial of the original issues between these parties a jury returned a verdict for the Plaintiff (Nelson) on both the complaint and the counterclaim.

2. Judgment was rendered on the verdict on July 30, 1984, by the Honorable Claude Neilson, Circuit Judge, who was specially assigned to try the case.

3. Defendant Lapeyrouse filed motions for J.N.O.V., and in the alternative, for new trial on August 8, 1984.

4. On November 5, 1984, Judge Neilson signed an order granting the Motion for New Trial, but that order was not filed until November 8, 1984.

5. Nelson filed an appeal of the order of November 5, 1984, and later a Petition for Writ of Mandamus asking that Judge Neilson be required to withdraw that order.

6. Lapeyrouse filed a cross appeal of the denial of its Motion for J.N.O.V.

7. On October 11, 1985, the Supreme Court issued its order mandating that Judge Neilson's order of November 5, 1984, be vacated.

8. Lapeyrouse filed an application for rehearing which was overruled on November 22, 1985. On December 11, 1985, Lapeyrouse filed this action, CV-85-500231 as an independent action pursuant to Rule 60, ARCP.

9. On December 12, 1985, Judge Neilson vacated his order of November 5, 1984.

The granting of Lapeyrouse's requested TRO was improvident. Motions pursuant to Rule 60(b) do not effect the finality of a judgment or suspend its operation. Similarly, such a motion does not extend the time for taking of an appeal. *Crockrell v. World's Finest Chocolate, Inc.*, Ala., 349 So. 2d 1117 (1977). Rule 60, ARCP is not a substitute for appeal. *Daphne v. Caffey,* Ala., 410 So. 2d 8 (1981), citing *Marsh v. Marsh,* Ala. Civ. App., 388 So. 2d 422 (1976). Stay of execution may be had upon appeal. Rule 62(b) ARCP. Further, there was no showing of those matters mandated by Rule 65(b).

Looking at Petitioner's four (4) basic grounds in reverse order, it is clear that Lapeyrouse has not appealed from the judgment rendered on the jury verdict and thus has not exhausted its legal remedies.

As to Lapeyrouse's defenses and meritorious grounds for counterclaim, these appear to have been available at the original trial and are thus matters going to the merits of the case which are not proper grounds for motions under Rule 60(b) ARCP. *Daphne v. Caffey, supra.* It should also be noted that Judge Neilson did not grant Lapeyrouse's Motion for J.N.O.V. and that Lapeyrouse unsuccessfully attempted to appeal from that denial.

As to the claim that equity and good conscience demands the setting aside of this judgment, it is clear that the issue of whether the verdict is due to be set aside on the grounds that it is against the great weight and preponderance of the evidence is a proper matter for the trial judge, who heard the evidence ore tenus, on Motion for

New Trial, or for the appellate courts on appeal. However, "the law of Alabama does not entitle a party to relitigate issues which were raised or could have been raised in the prior suit." *McSween v. McSween,* Ala. Civ. App., 366 So. 2d 293 (1979), citing *Anderson v. Moorer,* 372 F. 2d 747 (5th Cir. 1967). It further appears that as to these grounds for relief, "the defendant is in effect utilizing Rule 60(b) as an appeal from the final judgment, which is not permitted under our rules. *Daphne v. Caffey, supra.*

Finally as to Lapeyrouse's first grounds, that of mistake, inadvertence, accident or excusable neglect, it is clear from Judge Neilson's affidavit, attached to Exhibit D filed herein, that he was, mistaken as to the law pertinent to filing judgments under Rule 58, ARCP. While this court would have, prior to the Supreme Court's ruling, been subject to the same mistake of law, a mistake of law is not a mistake, inadvertence, surprise or excusable neglect as embodies in ARCP 60(b) (1). Nor can a mistake of law be a basis for granting relief under ARCP 60(b) (6). *Boles v. Hooper and McDonald, Inc.,* Ala. Civ. App., 424 So. 2d 634 (1932).

For the reasons set out above, it appears that the instant action, CV-85-500231, is not ripe and is untimely filed, and Respondent Nelson's Motion to Dismiss is due to be granted. Further, in as much as Respondent Nelson was required to appear and defend the unsupported request for TRO filed by Petitioner, Respondent Nelson is entitled to attorney's fees for such defense and upon request of Respondent Nelson, the court will set a hearing to determine the amount of such attorney's fees.

The Ten Thousand ($10,000) Dollar bond posted for the TRO shall remain in effect for further orders on attorney's fees and costs. The second bond of Seven Hundred One Thousand Nine Hundred Twenty-one Dollars and Eighty-four Cents ($701,921.84) is discharged.

It is hereby ORDERED, ADJUDGED and DECREED that the TRO heretofore issued, as extended, is due to be and it is hereby dissolved. It is further ORDERED, ADJUDGED and DECREED that Respondent Nelson's Motion to Dismiss is granted without prejudice. Petitioner Lapeyrouse shall be taxed with the costs of these proceedings.

Done this 2 day of January, 1986.

/s/ Thomas B. Norton, Jr.,
Circuit Judge

I, Eunice G. Tindal, Register of the Circuit Court of Baldwin County, Alabama, do hereby certify that the foregoing is a correct copy of the original decree rendered by the Judge of the Circuit Court in the stated cause, which said decree is on file and enrolled in my office.

WITNESS MY HAND AND SEAL this the 3rd day of January, 1986.

/s/ Eunice G. Tindal
Register of Circuit Court, In Equity

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-85-500231

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Plaintiffs,

vs.

FLORA JANE NELSON, individually and d/b/a W. J. NELSON COMPANY,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF ALABAMA

(Filed January 14, 1986)

Notice is hereby given that plaintiffs/appellants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama appeal to the Supreme Court of Alabama from the Order of the trial court dated and signed on January 2, 1986, and filed on January 3, 1986.

The Supreme Court of Alabama has jurisdiction inasmuch as the amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

/s/ C. B. Arendall, Jr.
/s/ Alex F. Lankford
/s/ Caine O'Rear III

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

DATE FILED: Jan. 14, 1986

Certified as true copy:

/s/ Eunice G. Tindal
Register of Circuit Court

B-57

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

MAILING ADDRESS: TELEPHONE: 261-4609

P.O. Box 157
Montgomery, Alabama 36101

Re: 85-471

LAPEYROUSE GRAIN CORPORATION, ET AL.

Appellant

vs.

FLORA JANE NELSON, ET AL.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

—XX—Appeal docketed. Future correspondence should refer to the above number.

————Court Reporter granted additional time to file reporter's transcript to and including

————Clerk/Register granted additional time to file clerk's record/record on appeal to and including

————Appell—— granted 7 additional days to file briefs to and including

————Appellant(s) granted 7 additional days to file reply briefs to and including

————Record on Appeal filed

————Appendix Filed

————Submitted on Briefs

———Petition for Writ of Certiorari denied. No opinion.

———Application for rehearing overruled. No opinion written on rehearing.

———Permission to file amicus curiae briefs granted

———1/24/86 ajh

Robert G. Esdale, Clerk

By: /s/ Dorothy F. Norwood,
Deputy Clerk
Supreme Court of Alabama